TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00805-CV

Devvy Kidd, Appellant

v.

Carlos Cascos, Texas Secretary of State, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT
NO. D-1-GN-14-003900, HONORABLE GUS J. STRAUSS, JR., JUDGE PRESIDING

MEMORANDUM OPINION

Devvy Kidd appeals the trial court's order granting the motion to dismiss under Rule 91a filed by Carlos Cascos, Texas Secretary of State.[1] *See* Tex. R. Civ. P. 91a. Kidd filed a Request for Writ of Prohibition and Injunction (petition) seeking a declaration that the Seventeenth Amendment to the United States Constitution has not been constitutionally ratified and that Cascos's actions pursuant to its terms are null, void, and illegal. Kidd also sought an injunction prohibiting Cascos from performing any acts pursuant to the terms of the Seventeenth Amendment. Cascos filed a motion to dismiss under Rule 91a, which the trial court granted. We affirm the trial court's order.

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[1] At the time Kidd filed suit, Nandita Berry was serving as Texas Secretary of State and was the named defendant. Pursuant to Rule 7.2(a), Carlos Cascos, as her successor, has been designated as appellee. *See* Tex. R. App. P. 7.2(a).

BACKGROUND

This suit arises out of Kidd's contention that the 1913 proclamation certifying ratification by the states of the Seventeenth Amendment to the U.S. Constitution, which provides for direct election of senators, was "false, fraudulent, constitutionally inadequate and invalid, and insufficient to make the Seventeenth Amendment part of the U.S. Constitution" and that the Seventeenth Amendment therefore "does not exist." Kidd maintains that there were "serious and gross errors" in the adoption of the Seventeenth Amendment based on her review of "historical records" dating back more than 100 years. According to Kidd, any actions taken in connection with electing U.S. Senators by popular vote are "null, void, and illegal," and Cascos should be enjoined from performing any act related to the election of any U.S. Senator pursuant to the terms of the Seventeenth Amendment.[2]

The Seventeenth Amendment to the U.S. Constitution provides for the election of U.S. Senators by popular vote. Specifically, the Amendment states:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.
>
> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

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[2] Cascos's actions with respect to senatorial elections consist of certifying nominated, independent, and write-in candidates for inclusion on the ballot. *See* Tex. Elec. Code §§ 142.010(a), 146.029(a), 161.008(a).

> This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

U.S. Const. amend. XVII.[3] The Seventeenth Amendment was adopted by the U.S. Senate on June 12, 1911, *see* 47 Cong. Rec. 1925 (1911), and by the U.S. House of Representatives on May 13, 1912, *see* 48 Cong. Rec. 6367 (1912). On May 17, 1912, the Secretary of the Department of State sent to the governors of all 48 states a certified copy of the "Joint Resolution Proposing an amendment to the Constitution providing that Senators shall be elected by the people of the several states" for ratification by the state legislatures. *See* U.S. Const. art. V (providing for ratification of amendments by either state legislatures of three-fourths of states or conventions in three-fourths of states); 37 Stat. 646 (1912) (joint resolution). On May 31, 1913, Secretary of State William Jennings Bryan certified to Congress, in accordance with his statutory duty,[4] that three-quarters of the states 36 states had ratified the proposed amendment and declared that the Seventeenth Amendment was "valid to all intents and purposes as a part of the Constitution of the United States." *See* 38 Stat. 2049, 2049 50 (proclamation). President Woodrow Wilson signed the amendment into law on May 31, 1914. Since the ratification of the Seventeenth Amendment, states have been required to hold elections "so that the people may select their senators by popular vote."

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[3] Prior to the ratification of the Seventeenth Amendment, U.S. Senators were selected by state legislatures. U.S. Const. art. I, § 3, cl. 1, *amended by* U.S. Const. amend. XVII; *see Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1171 (9th Cir. 2001).

[4] *See* Act of Apr. 20, 1818, ch. 80, § 2, Rev. Stat. § 205 (2d ed. 1878) (current version, as amended, at 1 U.S.C. § 106b (2012)) (section 205) (upon notice provided to Secretary of State that constitutional amendment has been adopted, Secretary of State shall cause amendment "to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the constitution of the United States").

Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 Nw. U. L. Rev. 1181, 1185 (2013).

In September 2014, Kidd filed her petition requesting declarations that the Seventeenth Amendment "has not been constitutionally ratified and made a part of [the U.S. Constitution]" and that Cascos's actions pursuant to it are "null, void, and illegal." Kidd also sought an injunction barring Cascos from "performing any act related to elections of any Senator pursuant to the terms of this 'non-amendment.'" Cascos filed an Original Answer, Affirmative Defenses, Motion to Dismiss under Rule 91a, and in the Alternative, Plea to the Jurisdiction and Special Exceptions. In the Rule 91a motion, Cascos asserted that Kidd failed to state any plausible legal claim upon which relief could be granted. *See* Tex. R. Civ. P. 91a.1. Kidd filed a response, and the trial court held a hearing on the Rule 91a motion only. The trial court granted the Rule 91a motion without reaching Cascos's alternative plea to the jurisdiction. This appeal followed.

APPLICABLE LAW AND STANDARD OF REVIEW

Rule 91a provides that a party may move to dismiss a cause of action on the ground that it has no basis in law or fact. *Id.* "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* The court may not consider evidence when ruling on a Rule 91a motion; instead, the ruling must be based only on the pleading of the cause of action and any supporting exhibits. *Id.* R. 91a.6. We review a trial court's ruling on a motion to dismiss de novo. *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App. Houston [14th Dist.] 2014, pet. denied); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App. Beaumont 2014, pet. denied). We base our review on

the allegations of the live petition and any attachments, and we accept as true the factual allegations. *Wooley*, 447 S.W.3d at 76.

Rule 91a is analogous to Federal Rule of Civil Procedure 12(b)(6), which "allows dismissal if a plaintiff fails 'to state a claim upon which relief can be granted[.]'" *GoDaddy.com*, 429 S.W.3d at 754 (quoting Fed. R. Civ. P. 12(b)(6)); *accord Wooley*, 447 S.W.3d at 76. Because of these similarities, federal case law interpreting Federal Rule 12(b)(6) is instructive to courts considering Rule 91a motions. *Wooley*, 447 S.W.3d at 76. A claim must be dismissed under Federal Rule 12(b)(6) if all the plaintiff's allegations are taken as true and the petition fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *GoDaddy.com*, 429 S.W.3d at 754 (quoting *Twombly*). Courts are not bound to accept as true a plaintiff's legal conclusions. *Twombly*, 550 U.S. at 555; *see City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 826 (Tex. App. Austin 2014, no pet.) (in evaluating sufficiency of pleadings, courts need not take legal conclusions as true). "[T]he purpose of Rule12(b)(6) is to 'streamline litigation by dispensing with needless discovery and factfinding.'" *Ghaffari v. Wells Fargo Bank NA*, __ Fed. Appx. __, No. 14-4794, 2015 U.S. App. LEXIS 12545, at *5 (3d Cir. July 21, 2015) (per curiam) (quoting *Neitzke v. Williams*, 490 U.S. 319, 326 27 (1989)).

DISCUSSION

In a single issue, Kidd contends that the trial court erred in granting Cascos's Rule 91a motion because she stated a valid claim for relief. In her petition, Kidd alleged that the Seventeenth Amendment has not been constitutionally ratified and made a part of the U.S. Constitution, so that Cascos's actions pursuant to it are void and future actions should be

enjoined. Her contentions are based on her review of documents maintained by the National Archives and Records Administration, copies of which were attached to her petition. They include the joint resolution of Congress adopting the Seventeenth Amendment, correspondence between the Secretary of State's office and state governors, Secretary of State Bryan's proclamation certifying the ratification of the Seventeenth Amendment, and certain states' legislative journals. According to Kidd, these records show that neither Wisconsin nor California ratified the Seventeenth Amendment. Kidd argues that the records show that although Wisconsin voted on the amendment, its resolution amended the first paragraph of the joint resolution and omitted the second paragraph. Relying on case law concerning state court invalidation of state legislation when there are material differences between the bill adopted by one legislative body and that adopted by the other, Kidd urges that "at least the same or a more stringent standard is required in the adoption of a constitutional amendment." Because Wisconsin substantially modified the joint resolution, Kidd concludes, it did not ratify the Seventeenth Amendment. Concerning ratification by California, Kidd argues that although Secretary of State Bryan certified that California was among the states ratifying the amendment, no vote of the California Legislature on the Seventeenth Amendment is reflected in the legislative journal or reported in any newspaper. Kidd thus infers that California did not vote to ratify the Seventeenth Amendment. Consequently, she contends, when President Wilson signed it into law, the number of states ratifying the amendment fell short of the required three-fourths of the states, or 36 states, and the Seventeenth Amendment is "a law that doesn't exist."

As an initial matter, we observe that a memorandum from the Officer of the Solicitor of the Department of State dated May 10, 1913, states that Wisconsin initially passed a resolution

substantially different from the joint resolution, that the Department informed the Wisconsin governor, and that the legislature then passed a second resolution identical to the joint resolution. The same memo not only indicates that California passed a resolution but also lists specific capitalization and punctuation errors contained in its resolution.[5]

In any event, even taking Kidd's allegations as true, we nonetheless conclude that she has not stated a claim that is "plausible on its face" and would entitle her to the relief sought. *See* Tex. R. Civ. P. 91a.1; *Twombly*, 550 U.S. at 570. As Cascos points out, once the Seventeenth Amendment was ratified, it became part of the U.S. Constitution and the "supreme Law of the Land," *see* U.S. Const. arts. V, VI, cl. 2, and since 1913, the U.S. Supreme Court and lower federal courts have interpreted and applied the Seventeenth Amendment on numerous occasions, *see, e.g.*, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 227 (1986) (Seventeenth Amendment applies to primaries in same manner as general elections); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985), *superseded by statute on other grounds*, as recognized in *Franklin v. City of Kettering*, 246 F.3d 531, 534 n.1 (6th Cir. 2001) ("[C]hanges in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913 . . . ."); *Gray v. Sanders*, 372 U.S. 368, 380 81 (1963) (Seventeenth Amendment states that choice of U.S. Senators "be made 'by the people,'" and "conception of political equality" in Seventeenth Amendment and other constitutional provisions "can mean only one thing one person, one vote");

[5] The Solicitor observed that all of the resolutions of the legislatures ratifying the proposed amendment contained capitalization and punctuation errors that were merely typographical, not substantial, and did not defeat the intention of the legislatures to ratify the amendment.

Judge v. Quinn, 624 F.3d 352, 358 (7th Cir. 2010) (Seventeenth Amendment supplies "concrete rule" requiring election to fill senate vacancy); *Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991) (observing that Seventeenth Amendment superseded Article I, section 3, clause 1 of U.S. Constitution). Thus, the Supreme Court and lower federal courts have consistently recognized the Seventeenth Amendment and upheld its requirement that U.S. Senators be elected by popular vote.

Further, the U.S. Supreme Court has rejected after-the-fact challenges to ratification procedures in challenges to other amendments. In *Leser v. Garnett*, the Supreme Court held that the Secretary of State's certification that state legislatures have ratified a constitutional amendment is "conclusive upon the courts." *See* 258 U.S. 130, 137 (1922) (rejecting challenge to validity of ratification of Nineteenth Amendment); *see also Coleman v. Miller*, 307 U.S. 433, 439 40 (1939) (discussing *Leser* and explaining that ratification was upheld because duly authenticated official notice to secretary of state of state legislatures' ratifications was conclusive upon secretary and secretary's proclamation was conclusive upon courts). Lower federal and state courts have likewise rejected similar procedural challenges to the Seventeenth Amendment. *See, e.g.*, *United States v. Stahl*, 792 F.2d 1438, 1439 (9th Cir. 1986) (citing *Leser* and holding that secretary of state's certification of adoption of Sixteenth Amendment was conclusive upon courts); *United States v. Carrier*, 944 F.2d 910, 1991 U.S. App. LEXIS 22610, at *3 (9th Cir. Sept. 24, 1991) (mem. op.) (not designated for publication) (dismissing as frivolous defendant's argument that the Seventeenth Amendment was invalid because it was proposed by Congress and adopted by state legislatures through quorum votes rather than total membership votes); *Trohimovich v. Department of Labor*

& Indus., 869 P.2d 95, 97 98 (Wash. Ct. App. 1994) (rejecting argument that Seventeenth Amendment was not properly ratified because resolution was proposed by majority of quorum votes of each house of Congress rather than by majority of total membership of each house and concluding that Amendment "is valid and does not render all congressional acts since its passage invalid").

Kidd acknowledges that "federal courts have held that proclamations like Secretary Bryan's issued pursuant to Revised Statutes § 205 are conclusive" and that "§ 205 has been construed to preclude impeachment of such proclamations." Nonetheless, citing Texas cases holding unconstitutional statutory irrebuttable presumptions implicating notice and other due process concerns, she argues that "conclusive presumptions are unconstitutional, at least in [the case of Bryan's proclamation]." In essence, Kidd asks this Court to contravene the United States Supreme Court's decision that a secretary of state's proclamation certifying ratification of a constitutional amendment is conclusive based on the premise that Texas law disfavors conclusive presumptions that violate due process. Even were we inclined to do so, which we are not, the United States Supreme Court is the highest court in the land, and its decisions are not subject to review by this Court or the trial court. *See* U.S. Const. art. III; *Poling v. Baltimore & Ohio R.R. Co.*, 166 F. Supp. 710, 721 (N.D. W. Va. 1958) ("It is incumbent upon this Court to follow the latest pronouncement of the highest court in the land."); *see also* U.S. Courts, Court Role and Structure, available at http://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited December 21, 2015). The United States Supreme Court has held that under articles III and VI, clause 2 of the United States Constitution, federal courts have the final say in all cases involving the U.S. Constitution, and states cannot interfere with judgments of federal courts. *See Ableman*

v. Booth, 62 U.S. 506, 517 21 (1859); U.S. Const. arts. III (establishing U.S. Supreme Court and lower federal courts), VI, cl. 2 (Supremacy Clause). In light of the U.S. Supreme court's holding in *Leser* that the U.S. Secretary of State's proclamation certifying ratification is conclusive upon the courts, and considering U.S. Supreme Court and lower federal court precedent upholding the ratification of and applying the Seventeenth Amendment in decisions spanning more than 100 years, a Texas court may not now hold that it was not validly ratified, and the trial court did not err in granting Cascos's Rule 91a motion to dismiss. *See Leser*, 258 U.S. at 137; *United States v. Sitka*, 845 F.2d 43, 47 (2d Cir. 1988) (given judiciary's consistent application of Sixteenth Amendment for more than 75 years and U.S. Secretary of State's certification that sufficient number of states ratified amendment, validity of ratification process and of Sixteenth Amendment are no longer open questions). We overrule Kidd's sole issue.[6]

CONCLUSION

We affirm the trial court's order granting Cascos's Rule 91a motion to dismiss.

____

Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

Filed: December 22, 2015

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[6] In her briefing, Kidd also asserts arguments concerning her taxpayer standing and Cascos's sovereign immunity, issues that were raised in Cascos's alternative plea to the jurisdiction. The record reflects that because the trial court granted Cascos's Rule 91a motion, it did not reach the alternative plea to the jurisdiction, and these issues are therefore not before us in this appeal.

No. 03-14-00805-CV

IN THE THIRD COURT OF APPEALS
at Austin, Texas

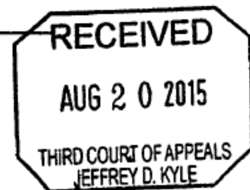
DEVVY KIDD,

Appellant,

v.

CARLOS CASCOS,
Texas Secretary of State,

Appellee.



On Appeal from the
53rd District Court of Travis County

REPLY BRIEF OF APPELLANT
DEVVY KIDD

DEVVY KIDD
Appellant *Pro se*
P.O. Box 1102
Big Spring, Texas 79721
[redacted]

ORAL ARGUMENT NOT REQUESTED

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ARGUMENT IN REPLY

ISSUE: Did the trial court err in dismissing my complaint seeking a Writ of Prohibition and Injunction?

In response to my complaint in the district court, the Secretary of State filed a motion to dismiss raising the defenses that I lacked "taxpayer" standing to bring this lawsuit, and that the doctrine of "sovereign immunity" required that my lawsuit be dismissed. In my reply to that motion, I addressed these two issues to demonstrate that I did have standing and that Texas caselaw held that the "sovereign immunity" defense did not apply here. The district court appears to not have addressed either of these arguments.

In my opening brief in this appeal, I specifically raised these issues of taxpayer standing and sovereign immunity, which the Secretary of State does not challenge in his brief submitted to this court. By failing to offer any response to these arguments in his brief filed here, that silence is a concession that I do have standing and that sovereign immunity is not an issue in this appeal.

But furthermore, in my opening brief I specifically raised the issue that Revised Statutes §205 as judicially interpreted and construed was unconstitutional as creating a conclusive presumption. It is remarkable that this extremely important issue is not addressed by the Secretary of State in his brief, not even with a single sentence in a footnote. Again, the Secretary of State has waived any response to this issue and

concedes my argument that Revised Statutes §205 is unconstitutional. See *Sunbeam Envtl. Servs., Inc. v. Texas Workers' Comp. Ins. Facility*, 71 S.W.3d 846, 851 (Tex.App.—Austin 2002, no pet.) (holding appellants waived issue of attorney's fees by failing to raise it in their initial appellate brief). Waiver is most often committed by an appellant, but an appellee can waive issues, too. See *Fed. Deposit Ins. Corp. v. Lenk*, 361 S.W.3d 602, 612 (Tex. 2012)("Lenk's cross-petition for attorney's fees was not properly raised in the court of appeals, and thus we reject this claim as well."). Other courts have acknowledged that appellees can waive issues by not briefing them. See *Burnley v. City of San Antonio*, 470 F.3d 189, 200 n.10 (5th Cir. 2006)(appellee waived argument for appellate attorney's fees by failing to sufficiently raise the issue in its brief); *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 924 (7th Cir. 2012)("The defendants have waived this argument by not developing it on appeal. See *Argyropoulos v. City of Alton*, 539 F.3d 724, 738 (7th Cir. 2008) (undeveloped arguments are waived). Their argument is in a footnote, consists of four sentences, and contains no citation to authority. The defendants attempt to 'incorporate . . . by reference' arguments in their brief to the district court seeking to dismiss the non-Franklin defendants on this basis, but 'appellate briefs may not incorporate other documents by reference.' *Albrechtsen v. Bd. of Regents*, 309 F.3d 433, 435-36 (7th Cir. 2002); see also *United States v. Foster*, 789 F.2d 457, 462 (7th Cir. 1986)."); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1207

(10th Cir. 2007)("Defendants made no argument regarding their interest as employers either in their motion for summary judgment or in their appellate brief. Accordingly, we cannot affirm summary judgment on this basis and must assume that Plaintiffs' interests in speaking on the four remaining matters outweighed Defendants' interests in managing the work environment. See *Tran v. Tr. of State Colleges in Colo.*, 355 F.3d 1263, 1266 (10th Cir.2004) ('Issues not raised in the opening brief are deemed abandoned or waived.')"; and *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316, 1318-19 (11th Cir. 2012).

But if this court does not conclude that the Secretary of State has waived this issue, it is certainly ripe for decision in this appeal.

Here in Texas, conclusive presumptions are unconstitutional. See *Tatum v. Liner*, 749 S.W.2d 251, 262-63 (Tex.App.-San Antonio 1988)("Mandatory conclusive presumptions are not permissible in Texas. For every presumption under Texas law, there is the right of rebuttal; and if the party opposing the presumption is able to disprove what was presumed, the jury is entitled to discard the presumption."). "Any such presumption could be removed by proof." *West's Executors v. Cameron County*, 4 S.W.2d 111, 116 (Tex.Civ.App.-San Antonio 1928). See also *People v. Pomykala*, 203 Ill. 2d 198, 204, 784 N.E.2d 784 (2003)("Thus, under Illinois law, all mandatory presumptions are now considered to be *per se* unconstitutional."); *State v. Russell*, 477 N.W.2d 886, 891 (Minn. 1991)("This court has recognized that statutes creating

conclusive presumptions of law or fact have been almost uniformly declared unconstitutional as denying due process of law."); and *State v. Kelly*, 218 Minn. 247, 15 N.W.2d 554, 557 (1944)("Such statutes are of two general types: Those creating conclusive presumptions of law or fact, and those creating rebuttable presumptions of fact or 'prima facie' proof. Those of the first type have met the almost uniform fate of being declared unconstitutional, as denying due process of law.").

My complaint against the Secretary of State sought at least a declaration that the Seventeenth Amendment, declared by Secretary Bryan as having been ratified pursuant to his authority based on Revised Statutes §205, had not been constitutionally ratified by the requisite number of States. An issue of this nature involving questions arising under the Constitution of the United States is an issue that can be raised in a Texas court because such questions are not exclusively "federal" questions that can only be raised in federal court. See *Yellow Freight System, Incorporated v. Donnelly*, 494 U.S. 820, 822 (1990)(state courts may exercise jurisdiction over federally created causes of action as long as Congress has not explicitly or implicitly made federal court jurisdiction exclusive); and *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U. S. 473, 477-478 (1981).

In *Dillon v. Gloss*, 256 U.S. 368 (1921), the United States Supreme Court was confronted with several questions regarding the ratification of the Eighteenth Amendment providing for prohibition. One matter that the Supreme Court determined

in that case is that when an amendment is proposed for ratification, it must be approved or rejected within a reasonable time: "We do not find anything in the article which suggests that an amendment, once proposed, is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective." Id., at 374. "We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal." Id., at 375. The Court in *Dillon* concluded that an amendment to the Constitution becomes effective on "the date of its consummation, and not that on which it is proclaimed". Id., at 376.

The "enrolled bill rule" is one that is judicially created. It has been modified here in Texas precisely because the rule appears to establish a conclusive presumption. See *Ass'n of Tex. Prof'l Educators v. Kirby*, 788 S.W.2d 827, 829 (Tex. 1990)("The enrolled bill rule is contrary to modern legal thinking, which does not favor conclusive presumptions that may produce results which do not accord with fact."). In reference to amendments to the U.S. Constitution, this enrolled bill rule is also judicially created. See *Leser v. Garnett*, 258 U.S. 130, 137 (1922).

But this federal "enrolled bill rule" applying to constitutional amendments is valid only because of Revised Statutes §205. If §205 is unconstitutional, then Secretary Bryan had no authority to declare ratification of the Seventeenth Amendment. Section 205 is unconstitutional because, as construed by the U.S.

Supreme Court, it contains a conclusive presumption, and "[m]andatory conclusive presumptions are not permissible in Texas." *Tatum v. Liner*, 749 S.W.2d 251, 262-63 (Tex.App.-San Antonio 1988). I offered irrefutable proof that neither California nor Wisconsin ratified this amendment. "Any such presumption could be removed by proof." *West's Executors v. Cameron County*, 4 S.W.2d 111, 116 (Tex.Civ.App.-San Antonio 1928).

Clearly, state governments create public records. The current California Constitution, in Art. IV, §7, requires each house of the legislature to keep a journal of its proceedings as does Art. IV, §10, of the present Wisconsin Constitution. Undoubtedly, the constitutions of these States had either these or similar provisions in effect in 1913. Those public records from these States that bear upon the question of the ratification of the Seventeenth Amendment have been obtained by me and such records constitute evidence that these States failed to legally ratify this amendment. To blindly assert as does the Secretary of State that there might be missing records showing ratification by these States is a baseless and groundless assertion.

This issue is very important. In 1787, the original 13 States of this country sent delegates to Philadelphia to draft a new constitution for the federal government known as the United States of America. That Constitution was ratified and a new government for the United States was created. New States, including Texas, have been admitted into this Union on an equal footing with the original States. Legally,

the States created the government for the United States of America and they are its masters. The government of the United States of America is the servant of the States.

This court has every legal and moral right to pass judgment on the events surrounding the ratification of the Seventeenth Amendment.

PRAYER

For the reasons noted above, the order of the trial court dismissing my lawsuit should be reversed and this cause remanded back to that court for further proceedings.

Respectfully submitted this the 17th day of August, 2015.

Devvy Kidd
Appellant *Pro se*
P.O. Box 1102
Big Spring, Texas 79721

CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), I certify that this document complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2). I certify that this whole brief contains 2086 words.

Devvy Kidd

CERTIFICATE OF SERVICE

I hereby certify that I have this date served by email a copy of the foregoing brief upon the below named counsel for the Secretary of State and have mailed a copy of this brief to: CERTIFIED MAIL RECEIPT: 7014 0150 0000 4734 1858

Adam N. Bitter
Attorney General's Office
P.O. Box 12548
Austin, Texas 78711-2548

Dated this the 17th day of August, 2015.

Devvy Kidd

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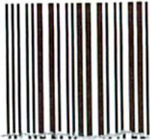

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No. 03-14-00805-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

FILED IN
3rd COURT OF APPEALS
AUSTIN, TEXAS
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JEFFREY D. KYLE
Clerk

Devvy Kidd,
Appellant,

v.

Carlos Cascos, Texas Secretary of State,
Appellee.

On Appeal from the 53rd Judicial District Court, Travis County
Trial Court Cause No. D-1-GN-14-003900

APPELLEE'S BRIEF

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ATTORNEYS FOR APPELLEE

ORAL ARGUMENT NOT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Appellee adopts Appellant's Identity of Parties and Counsel, with the following clarification regarding the name of the Appellee:

Appellee:	CARLOS CASCOS, TEXAS SECRETARY OF STATE (formerly Nandita Berry)
Counsel for Appellee: (trial and appellate)	ADAM N. BITTER Assistant Attorney General P.O. Box 12548 Austin, Texas 78711-2548 State Bar No. 24085070

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STATEMENT OF THE CASE

Nature of the Case:	Appellant Devvy Kidd seeks declaratory and injunctive relief challenging the ratification of the Seventeenth Amendment to the United States Constitution.
Trial Court:	53rd District Court, Travis County Hon. Gus J. Strauss, Jr., Judge Presiding
Course of Proceedings:	Kidd filed a Request for Writ of Prohibition and Injunction. CR 3-18.[1] Appellee Texas Secretary of State filed an Original Answer, Affirmative Defenses, Motion to Dismiss Under Rule 91a, and in the Alternative, Plea to the Jurisdiction and Special Exceptions. CR 97-113. Kidd filed a response to the Texas Secretary of State's Motion to Dismiss. CR 118-136.
Trial Court Disposition:	Following a hearing, the trial court entered an order on December 4, 2014 dismissing Kidd's petition pursuant to Texas Rule of Civil Procedure 91a. CR 137.

STATEMENT REGARDING ORAL ARGUMENT

Appellee believes that this appeal can be resolved without oral argument. However, Appellee will participate in oral argument should the Court so order.

[1] Cites to the Clerk's Record are cited as "CR" by page number stamped onto each page. Cites to this brief's appendix are cited as "App."

ISSUE PRESENTED

This appeal presents one central issue: Whether the trial court erred in dismissing, pursuant to Texas Rule of Civil Procedure 91a, Appellant's request for declaratory and injunctive relief challenging the ratification of the Seventeenth Amendment to the United States Constitution.

No. 03-14-00805-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

---

Devvy Kidd,
Appellant,

v.

Carlos Cascos, Texas Secretary of State,
Appellee.

On Appeal from the 53rd Judicial District Court, Travis County
Trial Court Cause No. D-1-GN-14-003900

APPELLEE'S BRIEF

TO THE HONORABLE THIRD COURT OF APPEALS:

Appellant's lawsuit is founded on the contention that the ratification of the Seventeenth Amendment to the U.S. Constitution—which provides for the direct election of U.S. Senators—was "false, fraudulent and constitutionally inadequate and invalid." CR 16. According to Appellant, any actions taken in connection with electing U.S. Senators by popular vote are therefore "null, void, and illegal." CR 17. Appellant seeks to enjoin the Texas Secretary of State, as the State's chief election officer, from "performing any act related to elections of any Senator pursuant to the terms of this 'non-amendment.'" CR 17.

Kidd fails to state any plausible legal claim and thus her petition was properly dismissed under Rule 91a. Upon its ratification in 1913, the Seventeenth Amendment became the "supreme Law of the Land." U.S. CONST. arts. V, VI, cl. 2. Time and time again, federal and state courts—including the U.S. Supreme Court—have applied and interpreted the Seventeenth Amendment without any suggestion that its ratification was improper. Instead, when presented with claims like those asserted by Kidd, courts have done precisely what the trial court did here: reject them as lacking any legal basis.

Accordingly, the Court should affirm the trial court's order.

STATEMENT OF FACTS

I. CONSTITUTIONAL BACKGROUND

The Seventeenth Amendment to the U.S. Constitution provides for the election of U.S. Senators by popular vote. Specifically, the Amendment states:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

U.S. CONST. amend. XVII, para. 1 (attached at App. 1).[2] Prior to the Seventeenth Amendment's ratification, U.S. Senators were selected by state legislatures. U.S. CONST.

[2] The Seventeenth Amendment also addresses elections of U.S. Senators when a vacancy occurs. *See* U.S. CONST. amend. XVII, para. 2 ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.").

art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII; *see also* Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 Nw. U. L. Rev. 1181, 1185 (2013).

The Seventeenth Amendment was adopted by the U.S. Senate on June 12, 1911, *see* 47 Cong. Rec. 1925 (1911), and by the U.S. House of Representatives on May 13, 1912, *see* 48 Cong. Rec. 6367 (1912). The Amendment was subsequently approved by thirty-six of forty-eight states then existing at the time, satisfying the threshold for adoption of constitutional amendments by state legislatures. *See* U.S. CONST. art. V. The thirty-sixth state (Connecticut) adopted the Seventeenth Amendment on April 8, 1913. *See* Kenneth R. Thomas et al., *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 112-9, at 34 n.9 (2014).

On May 31, 1913, U.S. Secretary of State William Jennings Bryan certified to Congress, pursuant to his statutory duty,[3] that three-quarters of the states had ratified the proposed amendment providing for the direct election of U.S. Senators. Certification of U.S. Secretary of State William Jennings Bryan, May 31, 1913, 38 Stat. 2049, 2049-2050 (attached at App. 3). Secretary of State Bryan's proclamation declared that the Seventeenth Amendment was "valid to all intents and purposes as a part of the

[3] *See* Act of April 20, 1818, ch. 80, § 2, Rev. Stat. § 205 (2d ed. 1878) (current version, as amended, at 1 U.S.C. § 106b (2012)) (upon notice provided to the Secretary of State that a constitutional amendment has been adopted, it is the Secretary of State's "duty . . . forthwith to cause the said amendment to be published in the said newspapers authorized to promulgate the laws, with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the constitution of the United States").

Constitution of the United States." *Id.*; Thomas et al., *supra*, at 34 n.9. Since the ratification of the Seventeenth Amendment, states have been required to hold elections so that U.S. Senators can be directly elected by the people. Clopton & Art, *supra*, at 1185.

II. PROCEDURAL HISTORY

On September 22, 2014, Kidd filed a Request for Writ of Prohibition and Injunction (the "Original Petition"). CR 3-18.[4] Kidd requested declarations that the Seventeenth Amendment "has not been constitutionally ratified and made a part of" the Constitution and that any actions taken by Appellee relating to senatorial elections "are null, void, and illegal." CR 17. Kidd also sought an injunction barring Appellee from "performing any act" in connection with senatorial elections. CR 17.

Appellee filed an Original Answer, Affirmative Defenses, Motion to Dismiss Under Rule 91a, and in the Alternative, Plea to the Jurisdiction and Special Exceptions on October 31, 2014. CR 97-113. In support of the Rule 91a motion to dismiss, Appellee asserted that Kidd failed to state any plausible legal claim upon which relief could be granted. CR 99-103. On November 14, 2014, Kidd filed a response to Appellee's motion to dismiss. CR 118-136.

The trial court held a hearing on December 4, 2014. CR 116-117, 137. After

[4] Kidd's Original Petition named Nandita Berry, in her official capacity as Texas Secretary of State, as defendant. During the pendency of this appeal, Carlos Cascos succeeded Nandita Berry as Texas Secretary of State and was substituted as Appellee. *See* TEX. R. APP. P. 7.2(a).

hearing arguments from Kidd and counsel for Appellee, the court granted Appellee's Rule 91a motion and dismissed all of Kidd's claims with prejudice. CR 137. The court did not reach Appellee's plea to the jurisdiction. CR 137.

SUMMARY OF THE ARGUMENT

Once ratified in 1913, the Seventeenth Amendment was incorporated into the Constitution and became the "supreme Law of the Land." In the hundred years since, the Seventeenth Amendment has been applied by federal and state courts, without any finding—let alone a suggestion—that it was improperly ratified. All the while, when presented with challenges to the Seventeenth Amendment's ratification, courts have repeatedly rejected them as baseless.

Reversing the lower court's judgment would require this Court to cast aside over one hundred years of settled law. This Court—like the court below—should decline that invitation. Kidd cannot allege any set of facts that would entitle her to the relief she seeks. Therefore, her petition was properly dismissed under Rule 91a and the trial court's judgment must be affirmed.

STANDARD OF REVIEW

Appellate courts review a trial court's ruling on a motion to dismiss de novo. *Go Daddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied). When a party moves under Rule 91a to dismiss claims as lacking any basis in law, the movant must establish that "the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief

sought." TEX. R. CIV. P. 91a.1.[5] In evaluating a Rule 91a motion, a plaintiff's legal conclusions in its pleading need not be taken as true. *City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 822, 826 (Tex. App.—Austin 2014, no pet.). The court may not consider evidence when ruling on a Rule 91a motion; instead, the ruling must be based only on the pleading of the cause of action and any supporting exhibits. TEX. R. CIV. P. 91a.6.

Rule 91a is analogous to Federal Rule of Civil Procedure 12(b)(6), which "allows dismissal if a plaintiff fails 'to state a claim upon which relief can be granted.'" *Toups*, 429 S.W.3d at 754 (quoting FED. R. CIV. P. 12(b)(6)). Because of these similarities, federal case law interpreting Federal Rule 12(b)(6) provides instructive guidance to courts considering a Rule 91a motion. *Id.* A claim must be dismissed under Federal Rule 12(b)(6) if the plaintiff fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Moreover, Federal Rule 12(b)(6) "authorizes a court to dismiss a claim on the basis of a dispositive issue of law . . . [to] streamline[ ] litigation by dispensing with needless discovery and factfinding." *Nietzke v. Williams*, 490 U.S. 319, 326-27 (1989) (citations omitted).

ARGUMENT

I. THE SEVENTEENTH AMENDMENT IS SETTLED LAW.

Appellant alleges that the Seventeenth Amendment was never properly ratified a

[5] Rule 91a is attached in its entirety at App. 2.

century ago and thus constitutes "a law that does not exist." CR 4; *see also* Appellant's Br. 29. These claims lack any basis in law and were appropriately rejected by the trial court, just as all other courts have done when faced with similar challenges to the Seventeenth Amendment's validity.

As expressly provided in the U.S. Constitution, once it was ratified by three-quarters of the states in 1913, the Seventeenth Amendment became a part of the Constitution and the "supreme Law of the Land." U.S. CONST. arts. V, VI, cl. 2. In the century since its ratification, the U.S. Supreme Court has considered the Amendment on numerous occasions. In these cases, the Supreme Court has found:

- The Seventeenth Amendment requires that the choice of U.S. Senators "be made 'by the people,'" *Gray v. Sanders*, 372 U.S. 368, 380 (1963).

- The "conception of political equality" in the Seventeenth Amendment and other constitutional provisions "can mean only one thing—one person, one vote," *id.* at 381.

- The Seventeenth Amendment "expan[ds] . . . the right of suffrage." *Reynolds v. Sims*, 377 U.S. 533, 555 n.28 (1964).

- As a result of the Seventeenth Amendment's adoption, "state power over the election of Senators was eliminated." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 n.16 (1995).

- The Seventeenth Amendment applies to primaries in the same manner as general elections. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 227 (1986).

The Supreme Court has never raised any doubt about the validity of the Seventeenth Amendment's passage or its continuing effect. To the contrary, the Court has

emphasized that the Amendment's provision for the popular election of U.S. Senators fits precisely into the structure of the federal electoral system. Most recently, in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013), the Court recognized:

> The Constitution prescribes a straightforward rule for the composition of the federal electorate. Article I, § 2, cl. 1, provides that electors in each State for the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," and the Seventeenth Amendment adopts the same criterion for senatorial elections.

Id. at 2257-2258; *see also Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985) ("[C]hanges in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913 . . . .").

At the same time, the Supreme Court has rejected after-the-fact challenges to the procedures under which constitutional amendments were adopted. As to these challenges, the Supreme Court has held that the U.S. Secretary of State's certification that state legislatures have ratified a constitutional amendment—like Secretary of State Bryan's 1913 proclamation confirming that three-quarters of the states had passed the Seventeenth Amendment—"is conclusive upon the courts." *Leser v. Garnett*, 258 U.S. 130, 137 (1922) (challenge to ratification of Nineteenth Amendment).[6]

[6] *See also United States v. Stahl*, 792 F.2d 1438, 1439-41 (9th Cir. 1986) (finding that the Secretary of State's certification that three-quarters of the states had ratified the Sixteenth Amendment was conclusive on the courts); *United States v. Thomas*, 788 F.2d 1250, 1253-54 (7th Cir. 1986) (recognizing that challenges to constitutional amendments are reviewed similarly to other legislative documents—that is, "[i]f a legislative document is authenticated in regular form by the appropriate officials, the court treats that document as properly adopted").

Unsurprisingly, lower federal and state courts likewise have applied and interpreted the Seventeenth Amendment since its ratification. *See, e.g.*, *Tullier v. Giordano*, 265 F.2d 1, 3 (5th Cir. 1959) (noting that the Seventeenth Amendment and other constitutional provisions "have considerably extended the scope of federal power to regulate the elective franchise"); *Judge v. Quinn*, 612 F.3d 537, 546-55 (7th Cir.) (considering whether the Seventeenth Amendment required a governor to issue writ of election to fill vacate U.S. Senate seat), *amended on denial of rehearing*, 387 F. App'x 629 (7th Cir. 2010).[7] None of these cases questioned the validity of the Seventeenth Amendment or suggested that the manner in which it was ratified impacts its continued authority in any way.

II. COURTS HAVE REPEATEDLY REJECTED CHALLENGES TO THE VALIDITY OF THE SEVENTEENTH AMENDMENT.

Appellee is aware of no case in which a court has found that the Seventeenth Amendment was improperly ratified. Just the opposite is true. When presented with arguments that the Seventeenth Amendment was not properly ratified, courts have consistently dismissed these claims as baseless. *See, e.g.*, *United States v. Carrier*, 944 F.2d 910 (9th Cir. 1991) (rejecting, as frivolous, defendant's argument that the Seventeenth Amendment was invalid because it was proposed by Congress and adopted by state legislatures through quorum votes rather than total membership votes); *United States v.*

[7] *See also Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C.) (three-judge panel) (Seventeenth Amendment claim in context of challenge to the District of Columbia's exclusion from congressional representation), *aff'd*, 531 U.S. 941 (2000).

Sluk, No. M-18-304, 1979 WL 1474, at *2-3 (S.D.N.Y. Oct. 2, 1979) (finding that the Seventeenth Amendment was adopted in accordance with the U.S. Constitution and dismissing claim that the Amendment should have been directly adopted by voters); *Trohimovich v. Dep't of Labor & Indus.*, 869 P.2d 95, 97-98 (Wash. Ct. App. 1994) (rejecting argument that the Seventeenth Amendment was not properly ratified and concluding that the Amendment "is valid and does not render all congressional acts since its passage invalid").[8]

III. KIDD'S PETITION WAS PROPERLY DISMISSED UNDER RULE 91A.

In this lawsuit, Appellant alleges that the Seventeenth Amendment was not properly ratified over a hundred years ago—the same underlying premise rejected by every court to reach the issue. *See supra* Part II. Specifically, Appellant contends that one state (California) did not adopt the Seventeenth Amendment and another state (Wisconsin) enacted a version with different language than the ratified Amendment. Appellant's Br. 27-29; CR 9-13. In support, Appellant points to certain "historical records"—namely, news accounts and legislative materials—that, according to Appellant, reflect that the ratification of the Seventeenth Amendment was "false." Appellant's Br. 8-9, 27; CR 9-13.

[8] *See also Trohimovich v. Comm'r*, 77 T.C. 252, 258-259 (1981) (rejecting argument that the Seventeenth Amendment was improperly ratified); *cf. Anderson v. Cal. Republican Party*, No. C-91-2091 MHP, 1991 WL 472928, at *3 (N.D. Cal. Nov. 26, 1991) (dismissing "untenable legal conclusion" that the Seventeenth Amendment was unconstitutional; "[t]he amendment, as part of the Constitution, is inherently constitutional"), *aff'd sub nom. Anderson v. Davis*, 977 F.2d 587 (9th Cir. 1992).

This Court need not scrutinize the merits of Kidd's legal arguments—or the "historical records" on which she bases her claims—to affirm the trial court's judgment. Rather, Kidd still would not be entitled to the relief she seeks even if her unfounded allegations are taken as true for the purposes of Rule 91a. *See* TEX. R. CIV. P. 91a.1. That is, even assuming Kidd were correct that the lack of news coverage and paucity of certain hundred-year-old legislative records create some doubt about whether the California Legislature passed the Seventeenth Amendment, or that selective archival materials raise questions about the form in which the Wisconsin Legislature adopted the Seventeenth Amendment, Kidd has failed to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Kidd overlooks that upon its ratification, the Seventeenth Amendment became the "supreme Law of the Land" as a part of the U.S. Constitution and has been settled law for the last century—even in the face of challenges like the one presented here. Kidd offers no basis for the Court to disregard this reality and allow her to press forward with specious claims. As a result, the Court must affirm the trial court's judgment.[9]

[9] Because the trial court did not reach Appellee's jurisdictional challenge, this appeal is limited to the Rule 91a dismissal. That said, even if Kidd's petition could somehow survive Appellee's Rule 91a motion (which it cannot), Kidd failed to establish that her claims were subject to the trial court's subject matter jurisdiction. Specifically, Kidd lacks standing to file this suit, her claims present only nonjusticiable political questions, and Appellee's sovereign immunity from suit has not been waived under the circumstances. CR 103-111.

PRAYER

Appellant has not established—and cannot establish—any plausible legal basis entitling her to the requested relief. Accordingly, Appellant's claims were properly dismissed pursuant to Rule 91a. The trial court's order must be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), this brief contains 2,879 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Adam N. Bitter
ADAM N. BITTER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was sent via Certified Mail, Return Receipt Requested on July 29, 2015 to:

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/s/ Adam N. Bitter
ADAM N. BITTER

No. 03-14-00805-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

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Devvy Kidd,
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Carlos Cascos, Texas Secretary of State,
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On Appeal from the 53rd Judicial District Court, Travis County
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APPELLEE'S APPENDIX

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APPELLEE'S APPENDIX

Tab 1 – U.S. CONST. amend. XVII

Tab 2 – TEX. R. CIV. P. 91a

Tab 3 – Certification of U.S. Secretary of State William Jennings Bryan, May 31, 1913, 38 Stat. 2049

TAB 1

C

United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment XVII. Popular Election of Senators
Amendment XVII. Popular Election of Senators

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Current through P.L. 114-25 (excluding P.L. 114-18) approved 6-15-2015

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TAB 2

C

Vernon's Texas Rules Annotated Currentness
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 4. Pleading
C. Pleadings of Defendant
Rule 91a. Dismissal of Baseless Causes of Action

91a.1 Motion and Grounds. Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

91a.2 Contents of Motion. A motion to dismiss must state that it is made pursuant to this rule, must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both.

91a.3 Time for Motion and Ruling. A motion to dismiss must be:

(a) filed within 60 days after the first pleading containing the challenged cause of action is served on the movant;

(b) filed at least 21 days before the motion is heard; and

(c) granted or denied within 45 days after the motion is filed.

91a.4 Time for Response. Any response to the motion must be filed no later than 7 days before the date of the hearing.

91a.5 Effect of Nonsuit or Amendment; Withdrawal of Motion.

(a) The court may not rule on a motion to dismiss if, at least 3 days before the date of the hearing, the respondent files a nonsuit of the challenged cause of action, or the movant files a withdrawal of the motion.

(b) If the respondent amends the challenged cause of action at least 3 days before the date of the hearing, the

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movant may, before the date of the hearing, file a withdrawal of the motion or an amended motion directed to the amended cause of action.

(c) Except by agreement of the parties, the court must rule on a motion unless it has been withdrawn or the cause of action has been nonsuited in accordance with (a) or (b). In ruling on the motion, the court must not consider a nonsuit or amendment not filed as permitted by paragraphs (a) or (b).

(d) An amended motion filed in accordance with (b) restarts the time periods in this rule.

91a.6 Hearing; No Evidence Considered. Each party is entitled to at least 14 days' notice of the hearing on the motion to dismiss. The court may, but is not required to, conduct an oral hearing on the motion. Except as required by 91a.7, the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59.

91a.7 Award of Costs and Attorney Fees Required. Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. The court must consider evidence regarding costs and fees in determining the award.

91a.8 Effect on Venue and Personal Jurisdiction. This rule is not an exception to the pleading requirements of Rules 86 and 120a, but a party does not, by filing a motion to dismiss pursuant to this rule or obtaining a ruling on it, waive a special appearance or a motion to transfer venue. By filing a motion to dismiss, a party submits to the court's jurisdiction only in proceedings on the motion and is bound by the court's ruling, including an award of attorney fees and costs against the party.

91a.9 Dismissal Procedure Cumulative. This rule is in addition to, and does not supersede or affect, other procedures that authorize dismissal.

CREDIT(S)

Adopted by order of Feb. 12, 2013, eff. March 1, 2013.

Current with amendments received through 6/1/2015

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TAB 3

THE

STATUTES AT LARGE

OF THE

UNITED STATES OF AMERICA

FROM

MARCH, 1913, TO MARCH, 1915,

CONCURRENT RESOLUTIONS OF THE TWO HOUSES OF CONGRESS,

AND

RECENT TREATIES, CONVENTIONS, AND EXECUTIVE PROCLAMATIONS

EDITED, PRINTED, AND PUBLISHED BY AUTHORITY OF CONGRESS
UNDER THE DIRECTION OF THE SECRETARY OF STATE

VOL. XXXVIII

IN TWO PARTS

PART 1—Public Acts and Resolutions
PART 2—Private Acts and Resolutions, Concurrent Resolutions, Treaties, and Proclamations

---

PART 1

WASHINGTON
1915

WILLIAM JENNINGS BRYAN,

SECRETARY OF STATE OF THE UNITED STATES OF AMERICA.

To all to Whom these Presents may come, Greeting:

May 31, 1913.

Know Ye that, the Congress of the United States at the second session, sixty-second Congress, in the year one thousand nine hundred and twelve, passed a Resolution in the words and figures following: to-wit—

"JOINT RESOLUTION

Proposing an amendment to the Constitution providing that Senators shall be elected by the people of the several States.

Seventeenth Amendment to the Constitution.
Preamble.
Vol. 37, p. 646.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That in lieu of the first paragraph of section three of Article I of the Constitution of the United States, and in lieu of so much of paragraph two of the same section as relates to the filling of vacancies, the following be proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the States:

Senators to be elected by the people.

'The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Filling of vacancies.

'When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

Existing terms not affected.

'This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.'"

States ratifying proposed amendment.

And, further, that it appears from official documents on file in this Department that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of Massachusetts, Arizona, Minnesota, New York, Kansas, Oregon, North Carolina, California, Michigan, Idaho, West Virginia, Nebraska, Iowa, Montana, Texas, Washington, Wyoming, Colorado, Illinois, North Dakota, Nevada, Vermont, Maine, New Hampshire, Oklahoma, Ohio, South Dakota, Indiana, Missouri, New Mexico, New Jersey, Tennessee, Arkansas, Connecticut, Pennsylvania, and Wisconsin.

Declaration.

And, further, that the States whose Legislatures have so ratified the said proposed amendment, constitute three-fourths of the whole number of states in the United States.

Certificate of adoption as part of Constitution.
R. S., sec. 205, p. 33.

Now, therefore, be it known that I, William Jennings Bryan, Secretary of State of the United States, by virtue and in pursuance of Section 205 of the Revised Statutes of the United States, do hereby certify that the Amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the city of Washington this thirty first day of May in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States of America the one hundred and thirty-seventh.

[SEAL.]

WILLIAM JENNINGS BRYAN

No. 03-14-00805-CV

IN THE THIRD COURT OF APPEALS
at Austin, Texas

DEVVY KIDD,

Appellant,

v.

CARLOS CASCOS,
Texas Secretary of State,

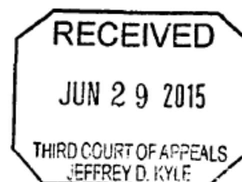
Appellee.

On Appeal from the
53rd District Court of Travis County

BRIEF OF APPELLANT
DEVVY KIDD

DEVVY KIDD
Appellant *Pro se*
P.O. Box 1102
Big Spring, Texas 79721

ORAL ARGUMENT NOT REQUESTED



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STATEMENT OF THE CASE

On September 22, 2014, I filed in the trial court a complaint seeking a Writ of Prohibition and Injunction (C.R. 3-18). That lawsuit was premised on the contention that the Seventeenth Amendment to the U.S. Constitution, which provides for the popular election of Senators, had failed to be lawfully ratified, and by means of my complaint, I sought an injunction against the Secretary of State's efforts to sponsor and conduct elections for Senators. On October 31, 2014, the Defendant/Appellee Secretary of State filed a motion to dismiss my complaint (C.R. 97-113), and on December 4, 2014, the trial court entered an order dismissing my complaint (C.R. 137). Notice of appeal was timely filed on December 19, 2014 (C.R. 140).

STATEMENT REGARDING ORAL ARGUMENT

I believe that the issue presented here is more than capable of decision without oral argument and therefor I do not request such arguments.

ISSUE PRESENTED

ISSUE: Did the trial court err in dismissing my complaint seeking a Writ of Prohibition and Injunction?

STATEMENT OF THE FACTS

The original United States Constitution provided that United States Senators shall be appointed by the various state legislatures: "The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof,

for six years; and each Senator shall have one vote." See U.S. Constitution, Art. I, §3, cl. 1. The Seventeenth Amendment provided for the popular election of senators rather than appointment by state legislatures.

In June, 1911, the U.S. Senate proposed this amendment, and the House concurred in May, 1912. That proposed amendment read as follows:

> "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.
>
> "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.
>
> "This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution ."[1]

Of the two separate methods for amendment as set forth in Art. V of the U.S. Constitution, Congress chose to have the state legislatures ratify this proposed amendment:

> "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the

---

[1] For promulgation of this amendment, see 37 Stat. 646.

one or the other mode of ratification may be proposed by the Congress". There were 48 States in this American Union in 1913, and thus it took 36 States to ratify this amendment to the U.S. Constitution.

At that time, if a state legislature ratified an amendment, it notified the U.S. Secretary of State of its ratification. If "three fourths" of the state legislatures concurred with the amendment as Congress proposed, the Secretary of State would issue a proclamation of ratification pursuant to Revised Statutes §205, which provided as follows:

> "Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."[2]

On May 31, 1913, Secretary of State William Jennings Bryan proclaimed that 36 States had ratified the Seventeen Amendment, and it was thus a part of the U.S. Constitution. See 38 Stat. 2049. Secretary Bryan listed the States of California and Wisconsin as two States that had ratified this amendment. Ever since that proclamation, U.S. Senators have been chosen via the election process it provides.

But the U.S. Constitution allows an amendment to take effect only "when

---

[2] The current law in this respect is codified at 1 U.S.C. §106b.

ratified by the legislatures of three fourths of the several states", and researchers have investigated this process and determined that several States did not legally ratify the amendment as required by the U.S. Constitution. As alleged in my complaint, the Wisconsin legislature amended the proposed amendment in material respects, and California never voted on the proposed amendment, yet these States were claimed by Secretary Bryan as having ratified it.

As proof of what the Wisconsin legislature did regarding this proposal, I attached Exhibit 4 (C.R. 65-66) to my complaint and it plainly shows that the legislature of Wisconsin amended the proposed amendment, a power which it lacked.

In a letter dated May 20, 1912, the Executive Chamber of the Governor advised the Secretary of State about the receipt of the Seventeenth Amendment Resolution from Congress. However, in a second letter from the Acting U.S. Secretary of State to the Governor of Wisconsin dated a full year later, it was noted that:

> "In paragraph 4 of the Joint Resolution passed by the Wisconsin Legislature, the following clause, which does not appear in the Joint Resolution passed by Congress, is inserted after the word 'vacancies' and before the words 'the following'".

However, the problem was far worse. Documents from the National Archives show that the Wisconsin State Assembly and Senate adopted the following text for the amendment, along with incorrect punctuation:

> "The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall make

> temporary appointments until the people fill the vacancies by election as the legislature may direct.
>
> "This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the constitution."

Not only did Wisconsin change the first paragraph, its legislature decided to completely eliminate the second one. A state cannot add text to a constitutional amendment nor can it simply decide to take out words, sentences or complete paragraphs in a proposed constitutional amendment. Absolute conformity must be adhered to or else possibly dozens of variations of an amendment to the U.S. Constitution would result, causing endless legal problems.

The letter mentioned above closed with a request by the Acting U.S. Secretary of State that the governor notify him as to the intention of the legislature regarding ratification of the proposed amendment. After due diligence and research, no documents can be found where Wisconsin ever corrected its invalid ratification.

While Secretary Bryan listed California as one of the States which ratified that amendment, in fact, it did not. The California State Legislature never voted on it, either the Assembly or Senate.

Exhibit 5 (C.R. 67-86) to my complaint contains a number of certified documents from the Secretary of State for the State of California, which proves no vote was ever taken for that constitutional amendment. And Exhibit 6 (C.R. 87) to my complaint was a compact disc of the entire California State Assembly Journal for the

year 1913. California has put their Assembly and Senate history dating back to the 1800s on the Internet. The certified documents in Exhibit 5 conform exactly to the entries found in Exhibit 6.

No vote was ever taken by the California Assembly or Senate on that amendment, either on January 28, 1913, or any other day of that entire year.

As seen from examination of the journal records in Exhibit 5, the Assembly voted on many bills, and each and every vote was recorded by the name of the elected Assemblyman, with the "yeas" and "nays" recorded. Had a vote on the proposed constitutional amendment really taken place, that vote would be recorded. It was not because no vote was taken by that legislature.

Additionally, newspapers of that era failed to memorialize any vote in favor of this amendment. In 1913, there were two prominent newspapers publishing in the State of California. The *San Francisco Call* is available on the Internet through the Library of Congress, and every issue it published until shuttered on December 8, 1913 is available.

The date that California's legislature is claimed to have ratified the Seventeenth Amendment is January 28, 1913. In the *San Francisco Call*'s archives for January 1913 through February 1913, there is no mention of the California State Legislature voting on any constitutional amendment. On January 30, 1913, the *Call* published a litany of legislative actions taken through that date, but, there is not a single line

about something as important as this constitutional amendment.

The *New York Times* began publishing in 1851, and all of its issues are available on microfilm. Searching from January 29, 1913 through February 1913, there isn't any coverage of the California State Legislature ratifying the Seventeenth Amendment. On January 30, 1913, the *New York Times* printed three separate items dealing with state legislatures:

(1) Delaware Chooses Saulsbury, dealing with two Democratic members of the General Assembly and a vote deadlock;

(2) For Income Tax Amendment out of Charleston, W.Va.; that legislature ratified the so called income tax amendment known as the Sixteenth Amendment;

(3) Denver, CO, January 29: The Colorado House of Representatives adopted the Seventeenth Amendment allowing for direct election of U.S. Senators.

Since the *Times* was covering legislative issues in the state capitols, why would it not publish a vote by California's State Legislature to amend the U.S. Constitution?

The U.S. Constitution requires that an amendment must receive approval by "three-fourths" of the States. There being 48 States in this American Union in 1913, 36 States were required to ratify this proposed Seventeenth Amendment. However, neither Wisconsin nor California legally ratified it, and the truth of the matter is that this proposed amendment fell two States short of ratification. By a false proclamation

of the Secretary of State, William Jennings Bryan, the federal government was radically changed.

SUMMARY OF ARGUMENT

To persuade the American public to assent to the adoption of ObamaCare, President Obama and other proponents of this legislation openly and frequently claimed that medical insurance premiums would decrease after it became law. Reality now shows those representations by the most powerful politicians in this country to be false. It is projected that ObamaCare will cause insurance premiums to increase 41% soon.[3]

But false statements by government officials are nothing new. The U.S. Constitution originally provided that the state legislatures would appoint Senators, but that original intent changed as a result of the Seventeenth Amendment.[4] It is alleged that the Seventeenth Amendment was ratified by 36 States, which is a bare constitutional threshold. This number of ratifying States includes Wisconsin and California. But, official public records from Wisconsin show that Wisconsin never adopted what Congress proposed regarding this amendment, and thus the claim that

---

[3] See: (accessed June 17, 2015): http://www.forbes.com/sites/theapothecary/2013/11/04/49-state-analysis-obamacare-to-increase-individual-market-premiums-by-avg-of-41-subsidies-flow-to-elderly/

[4] "The Senate will be elected absolutely and exclusively by the State legislatures." James Madison in Federalist Papers #45.

Wisconsin "ratified" this proposed amendment is false. Further, official public records from California clearly disclose that neither legislative house in California ever ratified this amendment. The claim that California ratified this amendment is also false.

I filed my "Seventeenth Amendment ratification" lawsuit against the Texas Secretary of State to enjoin that official from "providing all 254 election administrators in the State of Texas with a list of candidates for U.S. Senate to be placed on the ballot in each county" because this amendment had not been ratified. My complaint not only made clear factual assertions that neither Wisconsin nor California had ratified this amendment, but that complaint had attached to it a wealth of public records from these States to prove these allegations. The Texas Secretary of State, Texas Attorney General, or somebody retained for that purpose may visit the Archives in these States, but that party will discover exactly what I have discovered: the same documents attached to my complaint.

American courts have developed two separate and distinct rules for litigation that involves the question of whether a law or constitutional provision has been duly enacted. One rule, the journal entry rule, permits a court to examine legislative journals to determine whether any law was legally enacted by a legislature. The other rule, the enrolled bill rule, prohibits use of legislative journals to make this determination, the enrolled bill being presumed conclusive. Texas courts follow a

modified version of the enrolled bill rule; see *Association of Texas Professional Educators v. Kirby*, 788 S.W.2d 827, 830 (Tex. 1990). Texas law thus allows examination of the evidence I have acquired regarding the non-ratification of the Seventeenth Amendment, and thus my lawsuit was perfectly valid, it stated a claim for relief, and it was error to dismiss it.

ARGUMENT

I. Standard of Review.

This appeal involves an order of the trial court dismissing my complaint pursuant to a motion filed by the Defendant Secretary of State. When considering in an appeal the validity of a motion to dismiss, an appellate court "construe[s] the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine if the pleader has alleged facts that affirmatively demonstrate the trial court's jurisdiction over a claim." See *Wooley v. Schaffer*, 447 S.W.3d 71, 75 (Tex. App. —Houston 2014).

Here, attached to my complaint were a large number of public records and documents proving the various factual assertions I made in my complaint. These factual assertions must be taken as true when considering the validity of my complaint and whether the trial court erred in dismissing it. And as shown below, the case authorities in not only other States but also in Texas authorize lawsuits challenging the ratification of amendments to constitutions.

II. My Standing For This Lawsuit.

My complaint plainly alleged my standing to bring it. I live in Big Spring, Texas, where my husband and I own a home; we pay real property taxes every year. I pay all sorts of taxes imposed by the State of Texas, including sales taxes, gasoline taxes, etc. But furthermore, I am complaining in this case that the Appellee Secretary of State is engaged in illegal and unlawful acts and I am seeking a declaratory judgment respecting those acts. Clearly, I have constitutional standing to pursue my claims.

In *Lone Star College System v. Immigration Reform Coalition of Texas (IRCOT)*, 418 S.W.3d 263 (Tex.App.-Houston [14th Dist.] 2013), that court described the elements for stating a claim like I have made here: "to establish taxpayer standing to enjoin the illegal expenditure of public funds, a plaintiff must show: (1) the plaintiff is a taxpayer, and (2) public funds are expended on the allegedly illegal activity." Id., at 274. Clearly, I am a "taxpayer" and also just as clearly, there are substantial funds being spent to conduct elections for U.S. Senators. As the court in *Lone Star College System* stated, "allegations of payment of these taxes are sufficient to support state taxpayer standing." Id., at 277.

III. Waiver of Sovereign Immunity.

My complaint sought a declaratory judgment and injunction against a public official, and sovereign immunity has been waived for cases like this one. As the court

recounted in *Lone Star College System*, *supra*, "the Texas Supreme Court has declared that when claims challenge the validity of ordinances or statutes, relevant governmental entities must be made parties; thus, governmental immunity is waived for those entities. * * * Statutory challenges include claims that a statute is invalid for constitutional or nonconstitutional reasons and claims merely seeking interpretation or clarification of a statute." Id., at 271. Thus, a "suit asserting that a government officer acted without legal authority or seeking to compel a governmental official to comply with statutory or constitutional provisions is an *ultra vires* suit and is not subject to pleas of governmental immunity." Id., at 272. Here, a "sovereign immunity" defense is thus baseless and without foundation.

IV. The Merits of My Complaint.

A. The Majority Rule: Issues Regarding the Adoption of Constitutional Amendments Present Valid Judicial Questions.

In reference to the contention that the issue of the ratification of any amendment to a constitution presents only a political question, analysis of the determination of this issue by various state courts is very probative. The great weight of state authority is that issues concerning the ratification of amendments to state constitutions are properly judicial and not political issues. This proposition of law was precisely summarized by *In re McConaughy*, 106 Minn. 392, 119 N.W. 408 (1909), which held, after lengthy review of the authorities on this point, that an issue

regarding the ratification or adoption of a constitutional amendment was clearly to be judicially resolved.

Indeed, the U. S. Supreme Court has held that questions regarding the existence or non-existence of state laws presents a judicial question. In *Town of South Ottawa v. Perkins*, 94 U.S. 260 (1877), the U. S. Supreme Court succinctly stated:

> "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties . . . And whether it be a law or not a law is a judicial question, to be settled and determined by the courts and judges", Id., at 267.

> "... but, on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the Courts of the United States," Id., at 268.

When an issue regarding the existence of a law is raised, the U.S. Supreme Court has expressly sanctioned courts to determine the validity of such law by review of any public documents available which render aid to the judicial mind. This was clearly stated in *Gardner v. Collector*, 73 U.S. (6 Wall.) 499, 511 (1868), where the U.S. Supreme Court stated:

> "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such questions; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

An inexhaustive review of the multitude of state cases holding that an issue

regarding the adoption of a constitutional amendment presents a judicial question is particularly appropriate under these circumstances. The substance of these cases is that state courts will hold an amendment invalid if it has not been properly and lawfully adopted, this invalidity being determined by examination of many public records, most notably legislative journals. It must also be noted that while state courts do inquire into the adoption of amendments, they sometimes have a different rule in regards to legislation, with some courts following the "journal entry rule," and others following the "enrolled bill rule." See *Field v. Clark*, 143 U.S. 649, 12 S. Ct. 495 (1892).

Probably the first state court to be confronted with the issue concerning adoption of constitutional amendments was the Alabama Supreme Court. In *Collier v. Frierson*, 24 Ala. 100, 109 (1854), that court invalidated an amendment to the state constitution for the reason that it had not been properly adopted, the court holding:

> "It has been said, that certain acts are to be done – certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required, or these requisitions enjoined, if the Legislature or any other department of the government, can dispense with them. To do so, would be to violate the instrument which they are sworn to support; and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment, which is shown not to have been made in accordance with the rules prescribed by the fundamental law."

See also *Alabama v. Manley*, 441 So. 2d 864 (Ala. 1983). The rule enunciated in *Collier* has been frequently followed in many cases in other jurisdictions. See *Rice*

v. Palmer, 78 Ark. 432, 96 S.W. 396 (1906); *Knight v. Shelton*, 134 F. 423 (E.D. Ark. 1905); *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 P. 3 (1886); *Livermore v. Waite*, 102 Cal. 113, 36 P. 424 (1894); *People v. Curry*, 130 Cal. 82, 62 P. 516 (1900); *Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963, 967 (1912) ("The act of the Secretary of State in publishing at public expense and in certifying to the county commissioners proposed amendments of the Constitution is in its nature ministerial, involving the exercise of no discretion, and, if the act is illegal, it may be enjoined in appropriate proceedings by proper parties, there being no other adequate remedy afforded by law. When the alleged illegal act sought to be enjoined has relation to legislative action, such action may be considered in determining the legality or illegality of the act enjoined. This is not an interference by the courts with the legislative department of the government."); *Hammond v. Clark*, 136 Ga. 313, 71 S.E. 479 (1911); *Green v. State Board of Canvassers*, 5 Idaho 130, 47 P. 259 (1896); *McBee v. Brady*, 51 Idaho 761, 100 P. 97 (1909); *City of Chicago v. Reeves*, 220 Ill. 274, 77 N.E. 237 (1906); *People v. Stevenson*, 281 Ill. 17, 117 N.E. 747 (1917); *State v. Swift*, 69 Ind. 505 (1880); *In re Denny*, 156 Ind. 104, 59 N.E. 359 (1901); *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1 (1912); *Bennett v. Jackson*, 186 Ind. 533, 116 N.E. 921 (1917); *Koehler v. Hill*, 60 Iowa 543, 14 N.W. 738, 741-42, reh. den., 15 N.W. 609 (1883); *State v. Brookhart*, 113 Iowa 250, 84 N.W. 1064 (1901); *State v. Sessions*, 87 Kan. 497, 124 P. 403 (1912); *McCreary v. Speer*, 156 Ky. 783, 162

S.W. 99 (1914); *Graham v. Jones*, 198 La. 507, 3 So. 2d 761, 793-94 (1941)("It is said that chaos and confusion in the governmental affairs of the State will result from the Court's action in declaring the proposed constitutional amendment void. This statement is grossly and manifestly inaccurate. If confusion and chaos should ensue, it will not be due to the action of the Court but will be the result of the failure of the drafters of the joint resolution to observe, follow and obey the plain essential provisions of the Constitution. Furthermore, to say that, unless the Court disregards its sworn duty to enforce the Constitution, chaos and confusion will result, is an inherently weak argument in favor of the alleged constitutionality of the proposed amendment. It is obvious that, if the Court were to countenance the violations of the sacramental provisions of the Constitution, those who would thereafter desire to violate it and disregard its clear mandatory provisions would resort to the scheme of involving and confusing the affairs of the State and then simply tell the Court that it was powerless to exercise one of its primary functions by rendering the proper decree to make the Constitution effective."); *Loring v. Young*, 239 Mass. 349, 132 N.E. 65 (1921); *Rich v. Board of State Canvassers*, 100 Mich. 453, 59 N.W. 181 (1894); *State v. Powell*, 77 Miss. 543, 27 So. 927 (1900); *Gabbert v. Chicago, R. I. and P. Ry. Co.*, 171 Mo. 84, 70 S.W. 891 (1902); *State v. Tooker*, 15 Mon. 8, 37 P. 840 (1894); *Durfee v. Harper*, 22 Mon. 354, 56 P. 582 (1899); *State v. Babcock*, 17 Neb. 188, 22 N.W. 372 (1885); *State v. Tufly*, 19 Nev. 391, 12 P. 835 (1887); *State v. Davis*, 20

Nev. 220, 19 P. 894 (1888); *Bott v. Wurts*, 63 N.J.L. 289, 43 A. 744 (1899); *State v. Foraker*, 46 Ohio St. 677, 23 N.E. 491 (1890); *State v. State Board of Equalization*, 107 Okl. 118, 230 P. 743 (1924); *Kadderly v. Portland,* 44 Ore. 118, 74 P. 710 (1903); *Lovett v. Ferguson*, 10 S.D. 44, 71 N.W. 765 (1897); *Cudihee v. Phelps*, 76 Wash. 314, 136 P. 367 (1913); *Gottstein v. Lister*, 88 Wash. 462, 153 P. 595 (1915); *State v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892); and *State v. Marcus*, 160 Wis. 354, 152 N.W. 419 (1915).

The above survey of state cases regarding this issue, while not being exhaustive and inclusive of cases from every state, clearly shows that the great weight of state authority holds that questions concerning the adoption of an amendment to a state constitution are considered as judicial and not political issues.

B. The Necessity of Concurrence for Legislative Acts and Constitutional Amendments.

It is a common feature of many state constitutions to set forth the method through which an amendment to the constitution can be made. Such methods typically require one house of the legislature to propose an amendment, and this proposition must be accepted by the other legislative house. Some constitutions also require a subsequent legislative session to concur in a proposed amendment before it can be submitted to the voters at a general election. Other typical features related to propositions to amend state constitutions include publication of the proposed

amendment for a period of time before the election, and also a majority vote in favor of the amendment by the total number of voters voting in the election. The challenges to the adoption of amendments to state constitutions have arisen in situations where it is alleged that the procedure or method required by the constitution has been violated. As seen from the above review, state courts have invalidated amendments when such have not been adopted in the method required by the constitution.

To adopt a constitutional amendment, the state courts require not only precise conformity with the procedural method outlined in a constitution, but also precise concurrence. This means that both houses of a legislature must agree upon the same amendment, and this same amendment must be adopted by the people. No state court would sanction an amendment in a situation where both houses did not agree upon the same amendment, or where the people voted upon an amendment different from that proposed by the legislature. A failure in this respect vitiates the entire amendment because there is not complete but incomplete agreement on the amendment.

This was aptly demonstrated in *Koehler v. Hill*, 60 Iowa 543, 14 N.W. 738, 741-42, reh. den., 15 N.W. 609 (1883), where an amendment was determined not to have been adopted in accordance with the requirements of the Iowa Constitution because it was shown that there were minor word omissions between the amendment proposed by one legislative session and that proposed by a subsequent legislative session, which received the majority of the votes at election:

> "Not only so, but each house of each general assembly must agree to the same amendment, and it must be adopted by the electors. It matters not if not only every elector, but every adult person in the state, should desire and vote for an amendment to the constitution, it cannot be recognized as valid unless such vote was had in pursuance of, and in substantial accord with, the requirements of the constitution. If, then, both houses of the eighteenth general assembly did not agree to the resolution which was adopted and ratified by the electors at the special election held for that purpose, it is not a part of the constitution, and cannot be so recognized."

Constitutions are general frameworks of government and are considered paramount and supreme law. Because they should not be changed for light or transient causes, propositions to change a constitution by amendment are major undertakings. Not only is it hard to amend a constitution, it is also hard to repeal an amendment once it has become a feature of the constitution. This is in contrast with ordinary legislation, which is, comparatively, easier to enact, change or repeal. Statutes can be passed on one day and amended or repealed the next. Thus, it is quite apparent that constitutional amendments are far more important, when considering their adoption, than enactment of ordinary legislation. Since they are relatively more important than ordinary legislation, an examination of the preciseness of concurrence in legislation required by the state courts is invaluable in determining the preciseness of concurrence required to adopt a constitutional amendment.

The proposition of law demonstrated by the state cases in reference to the enactment of ordinary legislation is that both legislative bodies must adopt the same bill and the same bill must be presented to the governor for his approval or rejection.

If there are material differences between the bill adopted by one legislative body and that adopted by the other, or if there are differences between that which is adopted by both houses and the bill approved by the governor, the state courts will hold that there was no valid enactment of the statute. See *Ashcroft v. Blunt*, 696 S.W.2d 329 (Mo. banc 1985); *State v. Fridley*, 126 Ariz. 419,616 P.2d 94, (Ariz.App. Div. 1 1980); and *Watts v. Town of Homer*, 207 So.2d 844 (La.App. 2 Cir. 1968). If this preciseness is required for ordinary legislation, then at least the same or a more stringent standard is required in the adoption of a constitutional amendment.

An excellent example of a case dealing with concurrence in a proposed bill is *Moog v. Randolph*, 77 Ala. 597 (1884). Here, the Alabama legislature had adopted a bill which contained a certain phrase inserted in the same by way of amendment. In the bill sent to the governor, this phrase had been deleted, probably through error. Nonetheless, the Alabama Supreme Court struck the entire act, and in doing so stated:

> "I take it furthermore as a sound rule, also settled by our decisions, that if the bill which is passed by the General Assembly varies materially, in substance and legal effect, from that which is approved by the Governor – especially where this subject of variance involves a matter of amendment, without the incorporation of which in the bill one of the houses refused to concur with the other in its final passage – then there exists such a want of legal and actual identity between the bill passed and the one approved, as that neither of them acquires the force of a valid and constitutional enactment. In such a case, the bill passed by the General Assembly is not the one approved by the Governor, and the one approved by the Governor is, *e converso*, not the one passed by the General Assembly. The courts would be assuming too much, to presume that the same reasons which induced the one house to refuse to concur with the other, except on the condition of incorporating its amendment, might not

likewise operate to induce the Governor to withhold his approval of the entire measure, without which it must have failed to become a law," Id., at 599.

"Let us suppose, for illustration, that the bill in its complete form, as it passed the two houses, had been signed by the presiding officers of these respective bodies, and had been presented to the Governor for his approval, and he had drawn his pen through this same amendment, and, after thus expunging it, had approved the residue of the measure, this being done as a condition precedent to affixing his signature. Would there not exist, in such a case, precisely the same difference in fact between the bill passed and that approved, as is here presented? The part expunged in the one case, and the part omitted in the other, being identical, the identity of the remainder is axiomatic. Could any one seriously contend, that the approval of a part of a measure, however honestly done in the conviction of its propriety, would operate to give any legal force to the part thus approved? And yet, where is the difference, in practical effect, between the two cases? The clear logic of the case lies in the axiom, that a bill is an entirety, and a law is the product of the combined, harmonious and unanimous action of the legislative and executive departments of government, each acting strictly within the scope of its constitutional authority, and according to the prescribed forms of the constitutional mandate," Id., at 600.

This is an established proposition of law in Alabama and the Alabama Supreme Court has invalidated other pretended acts of legislation on this basis. See *King Lumber Company v. Crow*, 155 Ala. 504, 46 So. 646 (1908); *Mayor and Aldermen of West End v. Simmons*, 165 Ala. 359, 51 So. 638 (1910); *Yancy v. Waddell*, 139 Ala. 524, 36 So. 733 (1904); and *Board of Revenue of Jefferson County v. Crow*, 141 Ala. 126,37 So. 469, (Ala. 1904). A large number of other courts have held similarly. See *Rogers v. State*, 72 Ark. 565, 82 S.W. 169 (1904); *McDougal v. Davis*, 201 Ark. 1185, 143 S.W. 2d 571 (1940); *State v. Deal*, 24 Fla. 293, 4 So. 899 (1888); *Volusia County v. State*, 98 Fla. 1166, 125 So. 375 (1929), reh. den., 125 So. 813 (1930);

State v. Skaley, 108 Fla. 506, 146 So. 544 (1933); *Hillsborough County v. Temple Terrace Assets Co.*, 111 Fla. 368, 149 So. 473 (1933); *State v. City of Sanford*, 113 Fla. 750, 152 So. 193 (1934); *People v. Lueders*, 283 Ill. 287, 119 N.E. 339 (1918); *State v. Laiche*, 105 La. 84, 29 So. 700, 701 (1901); *County Commissioners of Washington County v. Baker*, 141 Md. 623, 119 A. 461 (1922); *Carnegie Institute of Medical Laboratory Technique, Inc. v. Approving Authority for Schools for Training Medical Laboratory Technologists*, 213 N.E.2d 225 (Mass. 1965); *Rode v. Phelps*, 80 Mich. 598, 45 N.W. 493 (1890); *State v. McClelland*, 18 Neb. 236, 25 N.W. 77 (1885); *Weis v. Ashley*, 59 Neb. 494, 81 N.W. 318 (1899); *Moore v. Neece*, 80 Neb. 600, 114 N.W. 767 (1908); *In re Jaegle*, 83 N.J.L. 313, 85 A. 214 (1912); *In re Kornbluh*, 134 N.J.L. 529, 49 A. 2d 255 (1946); *Oregon Business and Tax Research, Inc. v. Farrell*, 176 Ore. 532, 159 P. 2d 822 (1945); *Fuqua v. Davidson County*, 189 Tenn. 645, 227 S.W. 2d 12 (1950); *State v. Wendler*, 94 Wis. 369, 68 N.W. 759 (1896); *State v. Wisconsin State Board of Medical Examiners*, 172 Wis. 317, 177 N.W. 910 (1920); and *State v. Swan*, 7 Wyo. 166, 51 P. 209 (1897).

In this case, Wisconsin amended the amendment that Congress proposed, yet Congress did not reciprocate to this change. Wisconsin thus did not agree with the amendment that Congress proposed.

C. Conclusive Presumptions Are Unconstitutional.

In my complaint, I allege some very simple facts. The U.S. Constitution

requires "three-fourths" of the States to ratify constitutional amendments. In 1913, there were 48 States here in the United States of America, and thus it was required that 36 states ratify the Seventeenth Amendment. Secretary Bryan claimed in his proclamation of ratification that exactly 36 states had ratified this amendment and thus it was a part of the U.S. Constitution, and he issued such proclamation pursuant to Revised Statutes §205 quoted above. The federal courts hold that the question of ratification of an amendment as proclaimed by the Secretary of State presents not a judicial but a political question which the courts cannot address, those courts according to that proclamation a "conclusive" or "irrebuttable presumption". I argue here that conclusive presumptions are unconstitutional, at least in this context of according Secretary Bryan's proclamation conclusive effect. See *Medlin v. County of Henrico Police*, 34 Va. Ct. App. 396, 407 n.5, 542 S.E.2d 33, 39 n.5 (2001) ("irrebuttable presumptions are unconstitutional").

"A conclusive presumption is irrebuttable; 'when fact B is proven, fact A must be taken as true, and the adversary is not allowed to dispute this at all'." *Hammontree v. Phelps*, 605 F.2d 1371, 1374 fn 3 (5th Cir. 1979). Here, "fact B" as noted above is Secretary Bryan's 1913 proclamation that the Seventeenth Amendment was ratified, wherein he claimed that the 36 States that ratified the amendment included Wisconsin and California. What cannot be disputed is whether Wisconsin and California did in fact ratify the amendment, and "fact A" in the above illustration is

the supposed facts that Wisconsin and California did in fact and as a matter of law ratify the amendment. However, legitimate public records from these States present facts far different and exactly opposite: Wisconsin rejected the amendment that Congress proposed because it amended this amendment, and California never voted on it. The federal courts have held that proclamations like Secretary Bryan's issued pursuant to Revised Statutes §205 are conclusive, and the falsity of such a proclamation cannot be shown. Thus, Revised Statutes §205 has been construed so as to conclusively preclude impeachment of such proclamations.

In *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358 (1932), the U.S. Supreme Court was concerned with a conclusive presumption created by statute that gifts made by a deceased within two years of death were made in contemplation of death and were thus includible within the decedent's estate for tax purposes. In declaring this statute unconstitutional because it created an irrebuttable presumption, the Supreme Court stated:

> "[A] statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment," Id., at 325.
>
> "A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof [citation omitted]; and it is hard to see how a statutory rebuttable presumption is turned from a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into

existence a fact which here does not, and cannot be made to, exist in actuality, and the result is the same....This court has held more than once that **a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment**," Id., at 329. [emphasis added]

"If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law," Id., at 329.

There are lots of legal presumptions found in the law, and one concerns presumptions regarding the mailing of letters, a simple illustration that happens to be directly relevant here. During the Viet Nam war, there were lots of draft resisters who were prosecuted for engaging in that conduct. Pursuant to those draft laws, certain regulations had been promulgated which declared that the mailing of a notice to report for induction conclusively presumed that the draftee had been notified of such induction. In prosecutions for draft evasion which were premised upon this particular regulation, the validity of it was naturally drawn into question. In the first case concerning this issue, *United States v. Bowen*, 414 F.2d 1268, 1273 (3rd Cir. 1969), this regulation providing for an irrebuttable presumption that a mailed letter was received and provided notice to the addressee was held unconstitutional:

"The regulation in effect creates an 'irrebuttable or conclusive presumption' that mail sent is received. Such a presumption would make irrelevant any evidence the defendant-appellant did offer or might have offered to prove he did not receive the forms. Even if we were not dealing with a regulation that involved the critical issue of notice, the regulation cannot stand. We believe the regulation to be unconstitutional as violative of the due process clause of

the Fifth Amendment insofar as it purports to establish such an irrebuttable presumption.

"No administrative agency, nor even a legislature, may make the proof of one fact conclusive proof of another fact **in any proceeding, civil or criminal,** to the detriment of a private party." [emphasis added]

Following *Bowen* was a decision of an identical nature in *United States v. Simmons*, 476 F.2d 33, 37 (9th Cir. 1973). Here, the same regulation at issue in *Bowen* was likewise found to be unconstitutional as creating an irrebuttable presumption:

"The impact of the regulation and the instruction given, in effect, bootstraps mailing into receipt and receipt into notice. We, therefore, agree with the appellant that the instruction as given was violative of due process."

And in *United States v. Perry*, 474 F.2d 983, 984 (10th Cir. 1973), a conviction for draft evasion was likewise being scrutinized on due process grounds. Here, the government's proof of the mailing of the notice to report to draftee Perry consisted simply of showing a carbon copy of a letter contained within his administrative record. The majority of that court concluded that just producing that copy failed to create any inference of either its mailing or its receipt:

"Judges Breitenstein and McWilliams believe that the presence of the carbon copy in the file is proof of neither mailing nor time of mailing and that, on the record presented, mailing cannot be inferred from writing."

That court likewise held as did the courts in both *Bowen* and *Simmons* that the regulation in question was unconstitutional as creating an irrebuttable presumption.

See also *Tot v. United States,* 319 U.S. 463, 63 S.Ct. 1241 (1943); *United States v. Lake*, 482 F.2d 146 (9th Cir. 1973); and *United States v. Belgrave*, 484 F.2d 915 (3rd Cir. 1973).

The issue presented here is far more important than presumptions used to prosecute draft evaders. This case concerns presumptions having a relationship to the adoption of amendments to the U.S. Constitution. Secretary Bryan's proclamation stated that both Wisconsin and California had ratified this amendment, and this mere statement is alleged to preclude proof from Wisconsin and California documents and records showing otherwise and impeaching that proclamation. But, it is unquestioned that Wisconsin amended the constitutional amendment that Congress proposed, which legally means that Wisconsin did not ratify the amendment. But further, having personally researched the matter of whether California ratified the amendment, I can truthfully state, as supported by the conclusive documents that I have in my possession, that California never ratified this amendment. Just this fact alone demonstrates that Secretary Bryan's proclamation of ratification dated May 31, 1913 is false in this respect: his claim that California ratified this amendment is fraudulent. "Of course, in considering whether the Constitution has been violated, no conclusive presumption of truth is to be accorded the recitals of the *proces verbal* or of any other record, but the true facts may be developed." *Collins v. Walker*, 329 F.2d 100, 104 (5th Cir. 1964).

The federal courts claim that I cannot impeach Secretary Bryan's proclamation because that proclamation, issued pursuant to Revised Statutes §205, creates a conclusive presumption. But caselaw has changed substantially since that rule was developed, and now conclusive presumptions, at least in the context of this case, are unconstitutional. I thus can impeach Secretary Bryan's proclamation of ratification dated May 31, 1913, and since at most only 34 or 35 states ratified this amendment, it was not constitutionally adopted.

D. Application of Principles to This Appeal.

In response to my lawsuit, the Secretary of State filed a motion to dismiss, which the trial court granted.

I attached to my complaint copies of the various public records and documents from both Wisconsin and California that conclusively demonstrate the facts I alleged. I am not arguing that these documents created any presumption, and the Secretary of State, represented by the Attorney General, is more than welcome to engage in his own investigation of the public records of Wisconsin and California to disprove what I and many others have found. I feel very confident that the Attorney General will eventually realize that my public records from these States prove my allegations and he will thus stipulate to them.

However, at the stage of a motion to dismiss, my allegations must be construed as being true (and they will eventually be shown to be indisputable). Did my

complaint state a valid cause of action? In *Association of Texas Professional Educators v. Kirby*, 788 S.W.2d 827, 830 (Tex. 1990), our Supreme Court acknowledged that it will follow a modified version of the enrolled bill rule: "when the official legislative journals, undisputed testimony by the presiding officers of both houses, and stipulations by the attorney general acting in his official capacity conclusively show the enrolled bill signed by the governor was not the bill passed by the legislature, the law is not constitutionally enacted. When the official legislative journals, presiding officers and attorney general all concur that the enrolled bill is not the bill passed by the legislature, the exception applies as a matter of law."

Here, I contended that neither Wisconsin nor California validly ratified the Seventeenth Amendment and I offered copies of the actual public records showing that these are actual facts. The natural and logical conclusion that follows is that this amendment was "not constitutionally enacted."

My complaint stated a valid cause of action and the trial court erred when it dismissed it.

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PRAYER

For the reasons noted above, the order of the trial court dismissing my lawsuit should be reversed and this cause remanded back to that court for further proceedings.

Respectfully submitted this the 25th day of June, 2015.

Devvy Kidd
Appellant *Pro se*
P.O. Box 1102
Big Spring, Texas 79721

Filed in The District Court
of Travis County, Texas

DEC 0 4 2014

At 2:44 P M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-14-003900

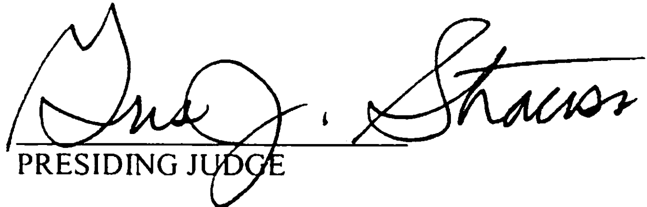
DEVVY KIDD, ***Plaintiff*** **vs.** **NANDITA BERRY,** **TEXAS SECRETARY OF STATE** ***Defendant***	§ § § § § § § § § § § § §	**IN THE DISTRICT COURT OF** **TRAVIS COUNTY, TEXAS** **53rd JUDICIAL DISTRICT**

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS UNDER RULE 91a

On this day came to be heard, the Motion to Dismiss Under Rule 91a filed by Defendant Nandita Berry, in her official capacity as Secretary of State. After reviewing said Motion, any response thereto, and arguments of counsel, the Court is of the opinion that Defendant's Motion to Dismiss Under Rule 91a should be GRANTED.

It is therefore ORDERED, ADJUDGED AND DECREED that Defendant's Motion is granted and that Plaintiff's Original Petition is dismissed with prejudice.

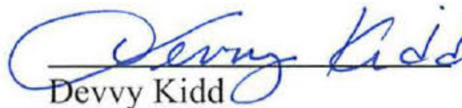
SIGNED on December 4, 2014.



PRESIDING JUDGE

CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), I certify that this document complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2). I certify that this document contains 7790 words.



Devvy Kidd

CERTIFICATE OF SERVICE

I hereby certify that I have this date served by email a copy of the foregoing brief upon the below named counsel for the Secretary of State and have mailed a copy of this brief to: CERTIFIED MAIL RECEIPT: 7014 0150 0000 4731 2445

Adam N. Bitter
Attorney General's Office
P.O. Box 12548
Austin, Texas 78711-2548

Dated this the 25th day of June, 2015.

Devvy Kidd

DEVVY KIDD, Plaintiff,	)	IN THE DISTRICT COURT
v.	)	OF TRAVIS COUNTY, TEXAS
NANDITA BERRY, Texas Secretary of State,	)	53 JUDICIAL DISTRICT
Defendant.	)	Case No. D-1-GN-14003900

REQUEST FOR WRIT OF PROHIBITION AND INJUNCTION

I. PARTIES.

1. The Plaintiff, Devvy Kidd, is a citizen and resident of Howard County in the State of Texas and seeks a Writ of Prohibition and Injunction against the Defendant in her capacity as Secretary of State. Plaintiff has "taxpayer standing". See *Andrade v. Venable*, 372 S.W.3d 134, 137 (Tex. 2012).

2. Plaintiff has a constitutional right to petition the government for redress of grievances, such constitutional right being predicated on the First Amendment of the United States Constitution, as well as Art. 1, Section 27, of the Texas Constitution. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)("Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition."); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983); *McDonald v. Smith*, 472 U.S. 479, 484 (1985)("filing a complaint in court is a form of petitioning activity"); *United States v. Hylton*, 710 F2d 1106, 1111 (5th Cir. 1983)(filing a lawsuit is a petition for redress of grievances); and *White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000).

3. The Defendant, Nandita Berry, is the Texas Secretary of State and is responsible for providing all 254 election administrators in the State of Texas with a list of candidates for U.S. Senate to be placed on the ballot in each county. To place any candidate names on the ballot for United States Senate would constitute an illegal activity because such activity would be done under a law that does not exist. The Seventeenth Amendment to the U.S. Constitution was not ratified by the required number of states.

4. In reference to Howard County, Texas, where Plaintiff resides, according to the Elections Division, the county prints and distributes prior to either a primary or general election certain materials for voters. Part of the costs are paid for by political parties with candidates on the ballot, but the remaining costs are paid by taxpayers. The rough estimate of cost for Howard County, Texas is $2,000 to the taxpayers for software programs.

The cost to the taxpayers to eliminate the office of U.S. Senator within the software required for a new general election in 254 counties would be substantial.

Defendant would be performing an unlawful act by authorizing inclusion of any individual on the ballot statewide as a candidate for the U.S. Senate under a law that does not exist, wasting a considerable amount of tax revenues.

II. RELEVANT FACTS.

5. On April 5, 1911, H.J. Res. 39 was introduced in the U.S. House of Representatives. That bill was to take away the rights of the sovereign states by allowing U.S. Senators to be elected by citizens of these united States of America.

6. H.J. Res. 39 was passed by the House on April 13, 1911. It was subsequently passed

by the U.S. Senate on June 12, 1911. As amended by the House, a second vote was taken May 12, 1912.

7. On May 17, 1912, Philander Chase Knox, then Secretary of the Department Of State, Washington, D.C., sent to the Governor of all 48 states a Resolution of Congress entitled "Joint Resolution Proposing an amendment to the Constitution providing that Senators shall be elected by the people of the several States." See Exhibit 1.

8. On May 10, 1913, a Memorandum from the Office of the Solicitor, Department of State, issued notice of the alleged ratification of the Seventeenth Amendment to the U.S. Constitution. See Exhibit 2. On page 2 of said document, it reads in part:

> "The Department has received information that thirty-six States have taken action purporting to ratify the amendment by Congress and no official information has been received from any State to the effect that the Legislature of that State has rejected the said Amendment."

9. One has to wonder why the Solicitor used the word "purporting" when describing the actions taken by the several States since the definition of "purporting" means "to present, especially deliberately, the *appearance* of being; profess or claim, *often falsely*: a document purporting to be official."

10. The answer to that question lies further into the documents in Exhibit 2, page 5:

> Errors in Resolutions of State Legislatures
>
> "The certified copies of all Resolutions passed by the Legislatures of the States ratifying the proposed amendment contain errors in quoting the Resolution passed by

Congress proposing the amendment as will be observed from the following list:"

11. The list of states making errors according to the Solicitor General is 36, the exact number of states required for ratification of a constitutional amendment in 1913.

12. Exhibit 3, dated May 31, 1913, is titled "Proclamation of the Secretary of State" who at the time was William Jennings Bryan, Secretary of State from March 5, 1913, until June 9, 1915). In Bryan's proclamation, he claimed that three-fourths of the whole number of states in these united States of America ratified the Seventeenth Amendment and thus it became a part of the U.S. Constitution.

13. Additionally, on page 2 of the aforementioned document dated May 10, 1913, authored by the Office of The Solicitor, Department of State, the following statement was made:

> "The Department has received information that thirty-six States have taken action purporting to ratify the amendment proposed by Congress and no official information has been received from any State to the effect that the Legislature of that State has rejected the said amendment."

14. The falsity of this claim is obvious. See Exhibit 2A, which is a letter from the Governor of Georgia, John M. Slaton, to William Jennings Bryan, Secretary of State at that time, dated May 7, 1914.

15. In this letter, Governor Slaton informed Secretary Bryan that the State of Georgia was taking no action on the proposed amendment. Back then, many state legislatures were out of session for up to four years at a time, so they were unable to take any action on the

proposed amendment.

16. However, that was not the case with Georgia. In this letter to Secretary Bryan, Governor Slaton informed him that Georgia had commissioned an investigation into the proper adoption of the proposed Seventeenth Amendment by Congress before it was sent to the states. That report concluded that Congress had not properly proposed the amendment and therefore Georgia would not vote on the amendment.

17. The parties involved, specifically William Jennings Bryan, simply decided to over look how our laws are made – especially those pertaining to a constitutional amendment. Bryan chose to ignore the necessity for concurrence in legislative acts.

18. Philander Knox was Secretary of State in 1913 prior to William Jennings Bryan, his term of service being from March 6, 1909 until March 5, 1913. At that time, Knox commenced a review of the documents he received regarding ratification of the Sixteenth Amendment and drafted a report dated February 15, 1913.

19. Therein, Knox noted that "under the provisions of the Constitution a legislature is not authorized *to alter in any way* the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment."

20. But having said this, Knox went on in the same report and noted all the various changes that the states had made to the amendment.

21. This is exactly the same thing that William Jennings Bryan did for the Seventeenth Amendment. This proposition that state legislatures cannot alter or change a proposed

constitutional amendment is derived from an establish legal principle which requires that legislative bodies, when considering any given legislative act, must agree to the exact same wording and punctuation of that proposed law. See *Ashcroft v. Blunt*, 696 S.W.2d 329 (Mo. Banc 1985). This legislative principle was discussed in a booklet titled *How Our Laws Are Made*, Document Number 97-120, 97th Congress, First Session, written by Edward F. Willett, Jr., Law Revision Counsel for the U.S. House of Representatives:[1]

> "Each amendment must be inserted in precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House. Obviously, it is extremely important that the Senate receive a copy of the bill in the precise form in which it passed the House. The preparation of such a copy is the function of the enrolling clerk.
>
> "When the bill has been agreed to in identical form by both bodies– either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both houses to the conference report– a copy of the bill is enrolled for presentation to the President.
>
> "The preparation of the enrolled bill is a painstaking and important task since it must reflect precisely the effect of all amendments, either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk.... must prepare meticulously the final form of the bill, as it was agreed to by both Houses, for

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[1] This publication is available on the Internet at: http://thomas.loc.gov/home/lawsmade.toc.html (accessed Sept. 2, 2014)

presentation to the President.... each (amendment) must be set out in the enrollment exactly as agreed to, and all punctuation must be in accord with the action taken."

As the court can see in Exhibit 2, William Jennings Bryan carefully listed state by state the incredible mess the states had made during the ratification process. Of the 36 states who allegedly ratified, 35 contained errors. Secretary Bryan blew them off and ignored those "mistakes".

22. What cannot be disputed and that which is shown by the historical records are serious and gross errors.

23. For example, Exhibit 4 plainly shows that the legislature of Wisconsin amended the proposed amendment, a power which it lacked.

24. In a letter dated May 20, 1912, the Executive Chamber of the Governor advised the Secretary of State about the receipt of the Seventeenth Amendment Resolution from Congress. However, in a second letter dated a full year later from the Acting U.S. Secretary of State to the Governor of Wisconsin, it was noted that:

"In paragraph 4 of the Joint Resolution passed by the Wisconsin Legislature, the following clause, which does not appear in the Joint Resolution passed by Congress, is inserted after the word 'vacancies' and before the words 'the following'".

25. However, the problem was far worse. Documents from the National Archives show that the Wisconsin State Assembly and Senate adopted the following text for the amendment, along with incorrect punctuation:

"The senate of the United States shall be composed of two senators from each state,

elected by the people thereof, for six years; and each senator shall make temporary appointments until the people fill the vacancies by election as the legislature may direct.

"This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the constitution."

26. The actual text of the questionably "adopted" Seventeenth Amendment by the U.S. Congress reads:

"The Senate of the United States shall be composed of two Senators from each state elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

"When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

"This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

27. Not only did Wisconsin change the first paragraph, its legislature decided to completely eliminate the second one. A state cannot add text to a constitutional amendment nor can it simply decide to take out words, sentences or complete paragraphs in a proposed

constitutional amendment. Absolute conformity must be adhered to or else possibly dozens of variations of an amendment to the U.S. Constitution would result, causing endless legal problems.

28. The letter mentioned above closed with a request by the Acting U.S. Secretary of State that the governor notify him as to the intention of the legislature regarding ratification of the proposed amendment. After due diligence and research, no documents can be found where Wisconsin ever corrected its invalid ratification.

29. While William Jennings Bryan listed California as one of the states which ratified that amendment, in fact, it did not. The California State Legislature never voted on it, either the Assembly or Senate.

30. Exhibit 5 contains a number of certified documents from the State of California, Secretary of State, which prove no vote was ever taken for that constitutional amendment.

31. Exhibit 6 is a CD of the entire California State Assembly and Journal for the year 1913. California has put their Assembly and Senate history dating back to the 1800s on line. The journal pages on Exhibit 5 exactly conform to the certified documents in Exhibit 6.

32. No vote was ever taken on that amendment, either on January 28, 1913, or any other day of that entire year.

33. As seen by going through the journal records on Exhibit 5, the Assembly voted on many bills, and each and every vote was recorded by the name of the elected Assemblyman, with "yeas" and "nays". Had a vote on the proposed constitutional amendment really taken place, that vote would be recorded. It was not because no vote was

taken by that legislature.

34. Additionally, newspapers of that era failed to memorialize any vote in favor of this amendment. In 1913, there were two prominent newspapers publishing in the state of California. *The San Francisco Call* is on line through the Library of Congress, and every issue it published until shuttered on December 8, 1913 is available.

35. The date that California's legislature is claimed to have ratified the Seventeenth Amendment is January 28, 1913. In the *San Francisco Call*'s archives for January 1913 through February 1913, there is no mention the California State Legislature voting on any constitutional amendment. On January 30, 1913, the *Call* published a litany of legislative actions taken through that date, but, there is not a single line about something as important as a constitutional amendment.

36. The *NY Times* began publishing in 1851, and all of its issues are available on microfilm. Searching from January 29, 1913 through February 1913, there isn't any coverage of the California State Legislature ratifying the Seventeenth Amendment. On January 30, 1913, the NY Times printed three separate items dealing with state legislatures:

(1) Delaware Chooses Saulsbury, dealing with two Democratic members of the General Assembly and a vote dead lock;

(2) For Income Tax Amendment out of Charleston, W.VA; that legislature ratified the so called income tax amendment known as the Sixteenth Amendment;

(3) Denver, CO, January 29: The Colorado House of Representatives adopted the Seventeenth Amendment allowing for direct election of U.S. Senators.

Since the *Times* was covering legislative issues in the state capitols, why would it not publish a vote by California's State Legislature to amend the U.S. Constitution?

37. Exhibit 7 is a CD of every single document from the States of the Union in 1913 regarding the ratification of the Seventeenth Amendment. Those documents were obtained by Plaintiff in person at the National Archives in Washington, D.C. and have been certified. However, no documents were found for Rhode Island, South Carolina, Vermont and Washington State.

In order to scan them, Plaintiff had to remove the seal, but Exhibit 8 are the seals.

38. Ratification of a constitutional amendment in 1913 required that 36 states pass a resolution quoting the *exact* language of the proposed constitutional amendment being ratified. However, the State of Wisconsin altered the text by deleting sentences and one complete paragraph, making it invalid. The State of California did *not* vote to ratify the Seventeenth Amendment to the United States Constitution.

39. Plaintiff has proven that the alleged Seventeenth Amendment was two states short of ratification: California and Wisconsin. Therefore, this amendment was not ratified by the required number of states.

40. President Woodrow Wilson signed it into "law" on May 31, 1913. Legal ratification was two states short when Wilson signed off on it.

41. The following year, Louisiana adopted the amendment on June 11, 1914, *after* it had (according to the U.S. Supreme Court in *Dillon v Gloss*) been consummated.

42. Fast forward to April 11, 2002. The State of Alabama suddenly decided 89 years

after the alleged ratification of the Seventeenth Amendment to ratify it.

43. On July 1, 2010, 97 years after the alleged ratification of the Seventeenth Amendment, the Delaware State Legislature suddenly decided to ratify that amendment.

44. Exhibit 9 contains three letters:

(1) A May 27, 1912 letter from the Governor of the State of Delaware to the U.S. Secretary of State at that time, Philander Knox, acknowledging receipt of a copy of the resolution from Congress regarding that amendment.

(2) A letter dated January 29, 1913, from Delaware's Secretary of State sent to the U.S. Secretary of State informing him that the Delaware legislature was in session and the matter would be placed before it.

(3) A letter dated May 7, 1914, from Delaware's Secretary of State to the U.S Secretary of State informing him that because it had been unofficially reported that the amendment had been ratified, Delaware would take no further action.

Yet, some 97 years later, it suddenly became important to ratify it?

45. On April 1, 2012, the Maryland State Legislature decided after 99 years it was suddenly important to ratify that amendment. One news account proclaimed the reason for such a late vote was because their legislature was in session in 1912 and 1914 and not 1913.

In fact, a copy of the proposed amendment was sent to all 48 states by U.S. Secretary of State Philander Knox on May 17, 1912, while Maryland was in session. How long can the ratification process last?

46. When President Wilson signed the Seventeenth Amendment into "law", it was

clearly two states short of ratification. Of the 36 states that allegedly ratified it, 35 had all sorts of errors acknowledged but brushed aside.

However, there can be no dispute Wisconsin clearly did not ratify the proposed amendment and California never voted for it.

47. The following year, Louisiana votes for it, and 89, 98 and 99 years later, three more states allegedly ratified the amendment. Should any of those four states be counted?

48. "The provisions of the act which the petitioner was charged with violating and under which he was arrested (title 2, 3, 26) were by the terms of the act (title 3, 21) to be in force from and after the date when the Eighteenth Amendment should go into effect, and the latter by its own terms was to go into effect one year after being ratified. Its ratification, of which we take judicial notice, was consummated January 16, 1919. *That the Secretary of State did not proclaim its ratification until January 29, 1919, is not material, for the date of its consummation, and not that on which it is proclaimed, controls.* It follows that the provisions of the act with which the petitioner is concerned went into effect January 16, 1920. His alleged offense and his arrest were on the following day; so his claim that those provisions had not gone into effect at the time is not well grounded." *Dillon v. Gloss*, 256 U.S. 368, 376-377 (1921).

49. On the date of the alleged ratification – not the date of proclamation by U.S. Secretary of State, William Jennings Bryan – only 34 states with all the mistakes "ratified" that amendment.

50. Since 36 states were needed at the time, the Seventeenth Amendment was not

ratified and later votes by other states "is not material, for the date of its consummation" controls. The Seventeenth Amendment is a law that doesn't exist.

51. Plaintiff is aware that Governor Rick Perry signed legislation into law in 2011 that would cut down on frivolous lawsuits. HB 274 was primarily designed to stop what would be deemed unnecessary lawsuits against employers. This is not a frivolous lawsuit.

52. Plaintiff is exercising her First Amendment right to petition government for redress of grievance, and what could be more egregious than the Defendant acting upon a law that does not exist?

53. This lawsuit is a "first impression" action that deals with fraud and the furtherance of specific fraud by allowing any candidate to appear on the ballot in the State of Texas to run for U.S. Senator. What could be more important than exposing the non-ratification of a constitutional amendment to the U.S. Constitution? Does the truth not trump frivolous? This court cannot consider any political ramifications of this action, but rather must allow this lawsuit to move forward.

COUNT 1: DECLARATORY JUDGMENT

The allegations contained in paragraphs 1 through 53 set forth above are incorporated herein by reference.

54. The alleged Seventeenth Amendment was not ratified by either the legislature of California or the legislature of Wisconsin, and thus the proclamation of ratification of the Seventeenth Amendment by William Jennings Bryan in May, 1913, was false, fraudulent and constitutionally inadequate and invalid, and insufficient to make the Seventeenth Amendment

a part of the United States Constitution. Even the purported ratification of this amendment by the legislature of Louisiana on June 11, 1914, did not bring the total number of ratifying States to the constitutional threshold of three-quarters of the States.

55. The alleged later ratifications of this purported amendment by the legislature of Alabama on April 11, 2002, by the legislature of Delaware on July 1, 2010, and by the legislature of Maryland on April 1, 2012, being separated by at least 89 years and more did not result in ratification of this amendment. See *Dillon v. Gloss*, 256 U.S. 368, 374-375 (1921)("We do not find anything in the article which suggests that an amendment, once proposed, is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. * * * We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.").

Wherefore, the premises considered, the Plaintiff prays for a declaratory judgment from this Honorable Court declaring that the alleged Seventeenth Amendment to the United States Constitution has not been constitutionally ratified and made a part of it, and that all of the acts of the Defendant Berry in reference to conducting elections in this State for United States Senator pursuant to the terms of this amendment are null, void, and illegal.

The Plaintiff also prays that this Court enter an injunction prohibiting Defendant Berry from performing any act related to elections of any Senator pursuant to the terms of this "non-amendment."

Respectfully submitted this the __ day of September, 2014.

____
Devvy Kidd, Plaintiff
P.O. Box 1102
Big Spring, Texas 79721